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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 232

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

EDMUND R. WELLS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1923

CERTIORARI AND RETURN FILED JULY 19, 1923

(29,427)

(29,427)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1923

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[fol. 1] UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the first Monday in November, A. D. 1922, at Fort Worth, Texas, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, Circuit Judges.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant,

versus

EDMUND R. WELLS et al., Appellees

Be it remembered, That heretofore, to-wit: on the 31st day of May, A. D. 1922, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Western District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3886, as follows, to-wit:

[fol. 2] CAPTION

Be it remembered, that at a regular term of the United States District Court in and for the Western District of Texas, The Honorable W. R. Smith, United States District Judge, presiding, and holding sessions in the El Paso Division thereof, at El Paso, Texas, which term began on the 3rd day of October, A. D. 1921, and continued in session to and including the 1st day of April, A. D. 1922, there came on to be heard and determined on the 22nd day of March, A. D. 1922, the following cause:

No. 129. In Equity

THE ATCHISON, TOPEKA & SANTA FE RAILWAY, COMPANY, Complainant,

vs.

EDMUND R. WELLS et al., Defendants

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

In Equity. No. —

THE ATCHISON, TOPEKA & SANTA FE RAILWAY, COMPANY, Complainant,

vs.

EDMUND R. WELLS et al., Defendants

BILL OF COMPLAINT—Filed Mar. 4, 1922

To the Honorable the Judge of the District Court of the United States for Western District of Texas:

Your complainant, The Atchison, Topeka & Santa Fe Railway Company, brings this, its Bill of Complaint, against Edmund R. Wells, a resident of El Paso county, state of Texas, Claude B. Hudspeth, a resident of El Paso county, state of Texas, George E. Wallace, a resident of El Paso county, state of Texas, A. J. Harper, a resident of El Paso county, Texas, Tom Lea, a resident of El Paso county, Texas, J. G. McGrady, a resident of El Paso county, Texas, R. E. Thomason, a resident of El Paso county, Texas, and E. T. Edwards, a resident of El Paso county, Texas, and thereupon complains and respectfully represents and alleges as follows:

First. Complainant is a corporation, organized and existing under and by virtue of the laws of the state of Kansas, and a citizen [fol. 4] thereof, with its principal office and place of business in the city of Topeka, in said state.

Second. That the defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, are residents and citizens of El Paso county, state of Texas, and of the Western District thereof, El Paso Division, and herein complainant avers that this suit is a suit or controversy between citizens of different states.

Third. That this is a suit or controversy arising under the constitution of the United States, and the amount involved exceeds the sum or value, exclusive of interest and costs, of three thousand dollars ($3,000), and if the acts and things herein complained of be not enjoined, a loss greatly in excess of the above amount, as hereinafter shown, will be entailed on complainant.

Fourth. Complainant is now, and for a number of years has been, engaged in the operation of lines of railway in the states of Illinois, Iowa, Missouri, Kansas, Nebraska, Oklahoma, Colorado, New Mexico, Arizona, California and Nevada, and as such is and has been a common carrier of freights and passengers for hire in all of said states; that it does not own any line of railway in the state of Texas, and that it does not operate any line of railway in the state of Texas, nor is it now engaged in its business as a common carrier of passengers and freight for hire in the state of Texas, and that it does not operate any line of railway in the state of Texas nor in El Paso county, in said state, nor has it conducted any business as a common carrier of [fol. 5] passengers and freight for hire in the state of Texas, nor operated any line of railway therein since the first day of April, 1914.

Fifth. Complainant alleges that on or about the 7th day of October, 1921, Edmund R. Wells, then a resident and citizen of the state of Colorado, by and through the defendants, Claude B. Hudspeth, George E. Wallace and A. J. Harper, under the firm name of Hudspeth, Wallace & Harper, and Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, under the firm name of Lea, McGrady, Thomason & Edwards, instituted suit in the District Court of El Paso County, Texas, Sixty-fifth Judicial District, against your complainant, same being numbered 21,135 on the docket thereof, for damages on account of personal injuries alleged to have been sustained by him, the said Edmund R. Wells, while in the employ of your complainant as a special officer; that at the time of filing the said petition, the plaintiff, through one of his attorneys, made affidavit, as authorized by law, that the defendant, Atchison, Topeka & Santa Fe Railway Company, was a corporation and non-resident of the state of Texas. Whereupon, notice to serve a non-resident was by the clerk of said court duly issued, attaching thereto a certified copy of plaintiff's petition in said cause, and same was, under date of October 12, 1921, delivered to E. L. Copeland, secretary and treasurer of complainant, at his office in Topeka, Kansas; and said plaintiff likewise caused a citation by publication to issue, as authorized by the laws of the state of Texas, and same was duly [fol. 6] published in a newspaper called the "Labor Advocate", said citation by publication appearing therein on the dates of October 14, October 21 and October 28, 1921; that in the notice to serve non-resident, hereinabove referred to, as well as in the citation by publication hereinbefore referred to, the defendant, Atchison, Topeka & Santa Fe Railway Company, was cited to appear on the first Monday in November, 1921, same being the 7th day of November, 1921, in the District Court of El Paso County, Texas, Sixty-fifth Judicial District, to answer in the said cause of Edmund R. Wells against the Atchison, Topeka & Santa Fe Railway Company. It was alleged in plaintiff's petition filed in said cause that the said plaintiff, Edmund R. Wells, was a citizen of the state of Colorado; that the defendant, Atchison, Topeka & Santa Fe Railway Company, was a foreign corporation, incorporated under the laws of the state of Kansas, and a citizen of said state, and for cause of action therein,

plaintiff averred in said petition that while employed by the defendant as a special officer and while engaged in the duties incident to his employment at San Marcial, New Mexico, and on, to-wit, the 25th day of March, 1921, he met with an accident and was seriously injured, said injuries consisting of a broken knee and knee cap, a strained leg and injuries to the bones and ligaments thereof. It was averred that in stepping from one of defendant's moving trains to the platform maintained at San Marcial and while in the exercise of due care for his own safety, he stepped into a hole or depression in the platform and was thrown or caused to fall in such a manner as to [fol. 7] receive the injuries herein above averred; that it was the duty of the railway company to keep said platform in a reasonably safe and suitable manner so that passengers might mount and dismount passenger trains without the danger of injury, and for the injuries complained of, the said Wells sought recovery in the sum of fifteen thousand dollars. A copy of the petition filed by him in said cause is hereto attached, made a part hereof and marked "Exhibit A" for identification.

Sixth. There is a statute in the state of Texas, same being chapter twenty-one, passed by the Thirty-third Legislature at its first called session and now known as article 247a, Revised Statutes, which reads as follows:

Attachments—Amending Chapter 1, Title 11, Revised Civil Statutes, 1911, Relating Thereto

H. B. No. 57. Chapter 21

An Act to amend Chapter one, Title eleven of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247a, providing for the issuance of attachments in suits against persons, co-partnerships, associations, or corporations upon whom personal service cannot be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Chapter one of Title eleven of the Revised Civil [fol. 8] Statutes of this State, adopted in the year A. D., 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247a as follows:

Art. 247a. Provided that nothing in this chapter shall prevent the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained within this State, founded in tort or upon demands which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attach-

ment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and this Act take effect and be in force from and after its passage and it is so enacted.

(NOTE.—H. B. No. 57 was passed by the House by a two-thirds [fol. 9] vote: yeas 101, nays 3; and was passed by the Senate by a two-thirds vote: yeas 28, nays 0.)

Received in the Executive Office August 19, 1913, and filed in the Department of State August 20, 1913, without the approval of the Governor.

Became a law August 20, 1913.

And in pursuance of the authority therein sought to be conferred, the said plaintiff, Edmund R. Wells, in the above styled cause, by attorney, made affidavit cotemporaneous with the filing of said suit, to the effect that the same was a suit against a foreign corporation; that personal service could not be obtained within this state; that the action was founded upon a demand which was unliquidated, and gave bond in the sum of thirty one thousand dollars ($31,000), which had been fixed by the judge of said court, as well as by the clerk thereof, and which said bond was by said judge and said clerk duly approved; whereupon a writ of attachment was on said 7th day of October, 1921, duly issued by the clerk of said court, wherein and whereby the sheriff or any constable of El Paso county, Texas, was commanded to attach forthwith so much of the property of the Atchison, Topeka & Santa Fe Railway Company, if to be found in said county, as should be of value sufficient to make the sum of fifteen thousand dollars ($15,000), and the probable costs of suit, to satisfy the demand of the said Edmund R. Wells, plaintiff in said action, which said writ of attachment was, on said date, placed in the hands of the sheriff of El Paso county, Texas, and was by him [fol. 10] duly returned on said date, not executed, for the reason that no property subject to attachment belonging to the Atchison, Topeka & Santa Fe Railway Company could be found in El Paso county, Texas.

That thereafter, and on said October 7, 1921, said Edmund R. Wells, by and through one of his attorneys, made affidavit to the effect that an original attachment had been issued in said cause and that he believed that the Rio Grande, El Paso & Santa Fe Railroad Company, a corporation, doing business in El Paso county, Texas, was indebted to the defendant, The Atchison, Topeka & Santa Fe Railway Company; whereupon he prayed that a writ of garnishment issue and summons the said Rio Grande, El Paso & Santa Fe Railroad Company as garnishee in said cause. A copy of said affi-

davit for writ of garnishment is attached hereto, made a part hereof, and marked "Exhibit B" for identification.

That thereupon, and on said 7th day of October, 1921, and based upon the affidavit and bond for attachment hereinabove referred to and on said affidavit for garnishment hereinabove referred to, said plaintiff caused a writ of garnishment to issue to the Rio Grande, El Paso & Santa Fe Railroad Company, a corporation, doing business in El Paso county, Texas, commanding it to appear and answer in said court on the 7th day of November, 1921, what, if anything, it was indebted to said The Atchison, Topeka & Santa Fe Railway Company, and was when said writ was served upon it, what effects, if any, of said The Atchison, Topeka & Santa Fe Railway Company it had in its possession and had when said writ was served, and [fol. 11] what other persons, if any, within its knowledge were indebted to said The Atchison, Topeka & Santa Fe Railway Company, which said writ of garnishment was duly served on the said Rio Grande, El Paso & Santa Fe Railroad Company on October 7, 1922; that said garnishment suit was docketed in said District Court of El Paso County, Texas, and styled "Edmund R. Wells, plaintiff, vs. Rio Grande, El Paso & Santa Fe Railroad Company, garnishee" and same was numbered 21,137 on the docket of said court.

Seventh. That in pursuance of said writ of garnishment so served upon it, the garnishee therein, Rio Grande, El Paso & Santa Fe Railroad Company, duly and within the time required by law, answered said writ, a copy of the answer so filed by said garnishee being attached hereto, made a part hereof, and marked "Exhibit C" for identification.

Eighth. That the defendant, The Atchison, Topeka & Santa Fe Railway Company, complainant herein, did not appear at the November term of said District Court of El Paso County, Texas, nor on November 7, 1921, as cited, and did not, in any way, manner or form, enter its appearance or subject itself to the jurisdiction of said District Court of El Paso County, Texas, in said cause of Edmund R. Wells against it, and did no act or thing indicating that it had in any way been properly cited to appear and answer in said suit and cause, or that it was subject to the jurisdiction of the District Court of El Paso County, Texas, in said cause; nor has it ever entered such appearance nor in any way subjected itself to the jurisdiction of said [fol. 12] court in said cause; that because of the failure and refusal of said defendant, The Atchison, Topeka & Santa Fe Railway Company, complainant herein, to so appear, the court, on the 8th day of November, 1921, in pursuance to article 1941 of the Revised Statutes of the State of Texas, which reads as follows:

Art. 1941. (1346.) (1212, 1345.) Procedure in Case of Service by Publication Where no Answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such

case, a statement of the evidence approved and signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit;

appointed E. F. Cameron and Robert T. Neill, attorneys, to defend the said suit in behalf of the defendant; that the appointment of said attorneys was never at any time authorized or ratified by the defendant, complainant herein, and the judgment was, in fact and in law, a judgment without appearance by or in behalf of your complainant.

Ninth. That the plaintiff in said action, Edmund R. Wells, [fol. 13] acting by and through his attorneys of record, the other defendants herein, secured and took judgment by default in said cause against your complainant on December 21, 1921, for the sum of four thousand dollars ($4,000), which said judgment is now a pretended demand against your complainant in all of its terms and conditions. A copy of said judgment is hereto attached, made a part hereof, and marked "Exhibit D" for identification, and demand has been made by the defendants herein for the payment of same and your complainant is informed and advised and so alleges that an effort will be made to enforce the payment of said judgment, written notice to that effect having been served upon attorneys for complainant herein by the said defendants. And complainant is informed and believes and so alleges that unless restrained, defendants will endeavor to collect the amount of said judgment from your complainant and apply the proceeds of such collection to the payment and satisfaction of the judgment so entered in the above described and entitled cause and as is more fully explained herein hereafter; that the defendants, Hudspeth, Wallace and Harper, and Lea, McGrady, Thomason and Edwards, as complainant is informed and believes, either jointly or some of them in behalf of all, had and have a written agreement with the said Edmund R. Wells, by the terms of which said Wells assigned and transferred to them, or some of them for the benefit of all, an undivided one-third interest in its said cause of action and in its said judgment, and to that extent, they and each of them are beneficial owners of said purported judgment [fol. 14] of December 21, 1921, hereinabove described.

Tenth. That afterwards, and on to-wit, January 24, 1922 judgment was entered in the cause of Edmund R. Wells vs. Rio Grande, El Paso & Santa Fe Railroad Company, garnishee, hereinabove described, by and under which the defenses interposed by said garnishee in its answer to the writ of garnishment served and hereinabove referred to as "Exhibit C," were held for naught, each and all of said defenses being overruled and by and under the terms of the decree so entered therein, said garnishee was held liable to plaintiff to the extent of the amount recovered by plaintiff against defendant, complainant herein, in cause numbered 21,135 a copy of said judgment being hereinabove referred to, and said judgment so entered in the suit against the Rio Grande, El Paso & Santa Fe Railroad Company as garnishee, is now a demand against said garnishee, and like-

wise a demand against your complainant, as and by the terms of said decree so entered in said garnishment suit, the funds necessary to satisfy the pretended judgment entered in the cause of Edmund R. Wells against complainant and in the hands of garnishee are being and will be withheld by said garnishee from your complainant, and it has been and is deprived of the use and benefit thereof, a copy of said last mentioned judgment being attached hereto, marked "Exhibit E" for identification.

Eleventh. That in the case of Atchison, Topeka & Santa Fe Railway Company vs. J. F. Weeks, et al., No. 109 In Equity, pending in this court and in a final decree entered therein on the 24th day of [fol. 15] April, 1920, it was determined that your complainant was not doing business in Texas and was not subject to the process nor to the jurisdiction of any court in Texas in causes of action arising from personal injuries; that the final decree so entered in said cause is still in full force and effect and that the status of complainant has in no particular changed since the entry of said decree and that the accident out of which the suit arose and made basis of this bill of complaint occurred in the state of New Mexico, where the said Edmund R. Wells was then employed, and that no part of same occurred within the state of Texas, nor did complainant at any time promise to settle or litigate the same, or any part thereof, within the state of Texas; that the relation of master and servant, as same is known to the law, existed only between your complainant and the said Edmund R. Wells within the state of New Mexico, and same has never existed within the state of Texas; that before and at the time of the filing of said suit by said Edmund R. Wells in the District Court of El Paso County, the complainant owned and operated, and since then has owned and operated, and now owns and operates lines of railroad extending through a number of counties in the state of New Mexico, including the county of Socorro in which said Edmund R. Wells claims to have been injured on the 25th day of March, 1921, and including the counties in which are situated the town of Las Cruces, Hillsboro, Las Lunas and Albuquerque, and also in the county in which La Junta, Colorado is situated, and in all of which counties, at all times herein mentioned, this complainant was [fol. 16] transacting business and had officers or agents upon whom service of process could have been had and now can be had, and in each of which said counties there then was and now is a court having jurisdiction of the cause of action of said Wells.

Twelfth. Complainant avers that under the laws of the State of Texas as construed by its courts, no special appearance could be entered by it in the said cause filed by the said Edmund R. Wells in the District Court of El Paso County, Texas, for the purpose of testing the service of citation therein, nor for the purpose of questioning the jurisdiction of said court over it for that, under the laws of Texas, an appearance for any purpose would be and will be held a general appearance for all purposes, and would thereby have subjected itself to the jurisdiction of said court for all purposes, and it would have been necessary for it to have gone to the unusual and

unnecessary expense of bringing its witnesses from New Mexico in order to make proper defense therein or to have taken their depositions, and that its defense could not have been properly, fully and intelligently developed by depositions so taken and that to have defended said suit in the District Court of El Paso County would have been a great and unwarranted burden upon and against it and upon interstate commerce; that the order and judgment entered by the District Court of El Paso County, Texas, in the above described cause of Edmund R. Wells against The Atchison, Topeka & Santa Fe Railway and numbered 21,157 on the docket thereof and entered on the 21st day of December, 1921, was without authority of law and [fol. 17] not binding on complainant and void.

Herein complainant avers that it could not have entered an appearance in the said District Court of El Paso County, Texas, for the purpose of moving to set aside said judgment by default for the purpose of testing the amount of damages to which the said Edmund R. Wells might be entitled, or for any purpose whatsoever, without, under the statutes of Texas as construed by its courts, subjecting its person to the jurisdiction of the said District Court of El Paso County, Texas, as under the statutes of the state of Texas as construed by the courts of said state, an appearance by defendant for any purpose in a court of said state, subjects it to the jurisdiction of such court for all purposes.

Thirteenth. That the service of the citations, as hereinabove described, was not service upon your complainant, and same as to it was null and void for the purpose of bringing it within or under the jurisdiction of the District Court of El Paso County, Texas, and that any judgment rendered upon such attempted service would be, is and has been rendered without appearance of the defendant herein, and same is and was violative of the Fourteenth Amendment to the Constitution of the United States and of that part thereof which provides that no state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, and that the enforce-[fol. 18] ment and attempted enforcement and collection of the judgment so rendered, as above described, would be as to your complainant violative of said Fourteenth Amendment to the Constitution of the United States in that same will deprive it of its property without due process of law and will be a denial to it of the equal protection of the laws, as hereinafter shown and made to appear; that article 1874, of the Revised Statutes of the State of Texas, reading as follows:

"Art. 1874. (1235) (1235) Citation by Publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a nonresident of the state, or that he is absent from the state, or that he is a transient person, or that his residence

is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such [fol. 19] citation shall be published once in each week for four consecutive weeks previous to the return day thereof."

and under which said article respondent undertook to obtain service and secure jurisdiction on and over complainant on the cause of action asserted, as well as article 1911 of the Revised Statutes of the State of Texas, hereinabove set out, are, each and both, as to your complainant, on the facts appearing and under which the judgment was entered in said cause of Edmund R. Wells against your complainant, wholly void and unenforcible, and said judgment so entered is and was wholly void and not enforcible because violative of the Fourteenth Amendment to the Constitution of the United States, hereinabove referred to, and that the service of citation on the secretary and treasurer of complainant at Topeka, Kansas, hereinabove described, conferred no jurisdiction upon or over your complainant on the cause of action alleged by the said Edmund R. Wells against it, and the judgment entered thereon is and was null and void because violative of the Fourteenth Amendment to the Constitution of the United States, hereinabove referred to.

Fourteenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, does not confer jurisdiction upon the courts in Texas over foreign railroad corporations on causes of action for personal injuries under the facts hereinabove appearing and the service of the writ of garnishment on the Rio Grande, El Paso & Santa Fe Railroad Company, as hereinabove appears, did not and does not confer jurisdiction upon the courts in Texas over the [fol. 20] defendant, complainant herein, nor did same confer jurisdiction on the court to hear and determine the cause of action declared upon in this, that said original suit of Edmund R. Wells against your complainant was based upon an unliquidated demand for damages for personal injuries, and there is and was no authority in law for the issuance and service of said writ of garnishment, and such issuance and service fixed no lien on any properties of your complainant which could be made the basis of a judgment in rem, and no jurisdiction was thereby conferred upon the District Court of El Paso County, Texas, over complainant on the cause of action declared upon; and in this behalf, complainant avers that article 247a of the Revised Statutes of the State of Texas, by its terms did not authorize the issuance and service of said writ of garnishment, and there is and was no statute of the state of Texas which did authorize the issuance and service of said writ of garnishment. And

herein complainant further avers that any statute of the state of Texas which undertakes to confer such authority and give jurisdiction in causes of action, as hereinabove described, is void, and the attempted enforcement of such statute will and would deprive your complainant of its property without due process of law, and will and would be a denial to your complainant of equal protection of the law, as required under the Fourteenth Amendment to the Constitution of the United States, and because of which, the plaintiff in said action, Edmund R. Wells, is not and was not entitled to receive aid from or by virtue of any statute of the state of Texas.

[fol. 21] Fifteenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, is wholly inapplicable to the facts of the case as declared upon by the plaintiff, Edmund R. Wells, in his original petition, and to construe the same as authorizing the issuance and service of the writ of garnishment, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920, and the legislature of Texas was and is without power to fix jurisdiction over your complainant on causes of action as declared upon by the said Edmund R. Wells, as well as to fix any lien on and against any funds or property belonging to your complainant and that may be in the possession of a resident of the state of Texas, and to construe said article of the Texas statute as so authorizing would, is and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended and the Transportation Act of 1920.

Sixteenth. That article 247a of the Revised Statutes of the State of Texas is void because thereunder judicial power is conferred upon the clerk of the court and to apply and enforce the same, as was done in the case of Edmund R. Wells against your complainant, has denied and will deny to your complainant the equal protection of the laws required under the Constitution of the United States, and it is and will be a taking of its property without due process of law.

Seventeenth. That article 247a of the Revised Statutes of the State of Texas, hereinabove set out, is void and wholly unenforcible in this, that additional rights and remedies are therein given against non-[fol. 22] residents of the state of Texas to any that may be asserted against residents of said state; and herein it is averred that there is no statute of the state of Texas which authorizes either the writ of attachment or the writ of garnishment on an unliquidated demand where the defendant resides within the state, and to authorize by law the right to a writ of attachment or a writ of garnishment on an unliquidated demand where the defendant resides out of the state, is and will be a denial to such defendant of the equal protection of the law, and is and will be a taking of such defendant's property without due process of law, and violative of the Fourteenth Amendment to the Constitution of the United States, and same is and will be violative of section 2, article 4, of the Constitution of the United States, which requires that citizens of each state shall be entitled to all the privileges and immunities of citizens in said state.

Wherefore, and for these reasons, said article 247a of the Revised Statutes of the State of Texas, is violative of the Constitution of the United States as applied to your complainant.

Eighteenth. That the issuance and service of the writ of garnishment on the Rio Grande, El Paso & Santa Fe Railroad Company, hereinabove described, conferred no jurisdiction upon the District Court of El Paso County over your complainant, or to hear and determine the cause of action declared upon against it by the said Edmund R. Wells, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded under [fol. 23] said writ of garnishment, as no judgment had been obtained against complainant by the said plaintiff prior to the issuance of said writ of garnishment, and there is no statute of the state of Texas creating, under such circumstances, a lien which may be foreclosed; and herein complainant avers that no valid judgment was ever or could have been obtained against complainant on the cause of action so asserted by the said Edmund R. Wells, and the property of complainant was not legally impounded under the writ of garnishment so issued and served, and same cannot under the laws of the state of Texas, be so impounded or foreclosed prior to the entry of a valid judgment against your complainant. There is no statute in Texas authorizing, under garnishment, judgment in rem against a non-resident to the extent of property impounded.

Nineteenth. Herein complainant avers that the judgment entered in favor of said Edmund R. Wells and against the Rio Grande, El Paso & Santa Fe Railroad Company was void, and same is wholly unenforcible in this, that the District Court of El Paso County, Texas, was without jurisdiction to hear and determine the cause of action asserted against your complainant by said Edmund R. Wells and the judgment entered therein was and is void, as hereinabove made to appear, and without such valid judgment, no judgment could be entered against garnishee in favor of said Edmund R. Wells; that the moneys and property so impounded in said cause under the writ of garnishment were not subject thereto; that plaintiff secured and had no lien thereon which could be foreclosed prior [fol. 24] to the entry of a valid judgment against complainant, and there was no authority in law for the issuance of said writ of garnishment; that the funds belonging to complainant, as well as the cars, engines and other railroad equipment impounded and held by the garnishee under and by virtue of said writ of garnishment, were not subject to seizure thereunder, no lien was or became fixed thereon by reason of said seizure and the garnishee was not liable under the answer filed by it under said writ, as appears therefrom; that the moneys so impounded (reference being here made to the answer of the garnishee) was not subject to the writ of garnishment in that same represented the balances due to your complainant from garnishee as its proportion of the transportation charges due entirely on interstate traffics and all of which accrued to your complainant on interstate business conducted wholly without the state of Texas, and that same is and will be needed by your complainant in the

carrying on of its transportation business wholly beyond the limits of the state of Texas, and which business it is required to conduct by the laws of the United States and orders of the Interstate Commerce, as well as the laws and orders of regulatory bodies in the states through which it operates and transacts its business, and that to withhold the same or any portion thereof under and by virtue of the writ of garnishment so served, as well as the judgment entered in the garnishment proceeding, will be and is violative of the amended act to regulate commerce approved May 29, 1917, as well as the Transportation Act of 1920, and particularly section 402 thereof; that to [fol. 25] perform its service to the public, as by law required, the funds herein impounded are and were needed and same is not subject to the process of garnishment as herein attempted, and no lien became fixed on and against the same by reason of the service of the writ of garnishment and the entry of judgment thereon; that the cars, engines and other railroad equipment set up in the answer of the garnishee (reference thereto being here made) are and were cars, engines and railroad equipment lawfully in the possession of garnishee under contract with your complainant, under and by which said garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights at the time of the service of the writ of garnishment herein, and all such having been delivered to garnishee by your complainant as a connecting carrier of interstate freights, and which would have been returned to complainant in due course of business, and were each and all needed by your complainant when so returned in the conduct of its business as an interstate carrier, and that none of same is and was subject to the writ of garnishment herein served; that to hold the same or subject any of same to the process of garnishment, as herein attempted, would be and is violative of the provisions of the amended Interstate Commerce Act of May 29, 1917, as well as the provisions of the Transportation Act of 1920, and particularly section 402 thereof; that by reason of said acts of Congress and each of same, the equipment so impounded is and was placed beyond the reach of the process of the District Court of El Paso County as herein attempted; that to with- [fol. 26] hold the funds or any portion thereof so impounded under said writ of garnishment, as well as to hold said railroad equipment or any portion thereof under said writ, is without authority of law and void and to subject said moneys and said properties so impounded or any of same under the process of the writ of garnishment, as herein attempted under the provisions of article 247a of the Revised Statutes of the State of Texas, is depriving and will deprive your complainant of its properties without due process of law, and will be a denial to it of the equal protection of the laws, violative of the Fourteenth Amendment to the Constitution of the United States, and will likewise be violative of Section 2, article 4, of the Constitution of the United States; that for these, each and all of said reasons, the judgment so entered in the garnishment proceeding against the Rio Grande, El Paso & Santa Fe Railroad Company is null and void and nonenforcible.

Twentieth. That the Act to regulate Commerce as amended (Paragraph 4, Section 1) makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable divisions of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6, Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all [fol. 27] other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service and to make just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality or any particular description of traffic to any unreasonable prejudice [fol. 28] or disadvantage in any respect whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the interchange of traffic between their respective lines for the receiving, forwarding and delivery of passengers or property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

That for many years it has been the custom and practice of rail carriers, with exceptions too unimportant to require mention here,

to allow their freight charges to follow the shipments so that the delivering line collects the entire freight charges of all carriers over whose lines the shipments have moved, and the delivering carrier accounts to the other carrier or carriers for its or their proportion of the freight collected. That for many years it has been the custom in order to serve the convenience of passengers for the initial line to sell passenger tickets and coupons good for transportation over connecting lines, to collect from the passenger the entire charge and to account to the connecting line or lines for its or their proportion [fol. 29] thereof. That the garnishee owns and operates a railroad only 20.22 miles long, extending from El Paso, Texas, to the New Mexico-Texas state line, where it connects with the railroad of plaintiff, at which point there is no station and no business reason for the stoppage of trains. That the city of El Paso has a population of 50,000 or more and has a very large commerce originating therein and passing through; that in order to properly serve El Paso and its commerce without subjecting it to any undue prejudice, disadvantage or discrimination and to comply with the provisions of the Act to Regulate Commerce, it is necessary that plaintiff, as it has done in the past, to permit its cars and engines to run over the railroad of garnishee to and from El Paso, to permit garnishee to collect the freight charges for the proportion thereof accruing to plaintiff on freight passing over its line destined to El Paso, to permit the garnishee to sell through tickets good for passage over the railroad of plaintiff, to collect the charge from the passengers and account to plaintiff for its proportion thereof; that such monies due plaintiff by garnishee hereinbefore mentioned were monies so collected by garnishee under such practices for account of plaintiff. That if the statutes of Texas be so construed (as they were applied in said garnishment case) as to authorize the seizure by attachment of cars and engines of plaintiff while in possession of garnishee or to authorize the seizure by writ of garnishment monies due and to become due plaintiff by garnishee herein by collection by garnishee of freight and passenger charges for account of plaintiff under the [fol. 30] practice aforesaid, such statutes so construed will interfere with, impede and obstruct plaintiff in the performance of the duties imposed upon it by the Act to Regulate Commerce and will interfere with and obstruct the Interstate Commerce Commission in the performance of its duties imposed by said Act, or such statutes so construed will deprive plaintiff of its property and rights without due process of law, since it is not due process of law when requiring plaintiff by the Act to Regulate Commerce to permit its cars and engines to run into El Paso and to permit the garnishee to collect its freight and passenger charges, to require plaintiff to submit to the jurisdiction of the state courts at El Paso, Texas, on causes of action of citizens and residents of other states, originating in such other states which have no relation whatever to any traffic or transportation to or from El Paso or to any business or thing therein, and such would be the result if the procedure resorted to and herein complained of should be sustained, and from which it follows that such

statutes when so construed are contrary to the Constitution of the United States and the laws enacted in pursuance thereof

Twenty-first. That article 293 of the Revised Statutes of the State of Texas provides as follows:

"Art. 293. (239.) (205.) Judgment Against the Garnishee When He is Indebted.—Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, [fol. 31] that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs."

And your complainant avers that the garnishee, by reason of the service of said writ of garnishment upon it, and by reason of the rendition of the judgment in said garnishment proceeding, (reference here being made to "Exhibit E"), said garnishee is now withholding and will continue to withhold sufficient of the funds in its possession belonging to your complainant to satisfy the judgment so entered against it, and unless restrained defendants will cause execution to issue against garnishee and thereby attempt to force the payment of the judgment by the garnishee, and will attempt to apply to the extinguishment thereof sufficient of the funds belonging to your complainant and as described in the answer filed in said garnishment proceedings, as will satisfy the demand of the defendants, that your complainant is now deprived of the use and benefit of the funds so withheld, same being greater in amount than the sum of four thousand dollars ($4,000), and unless restrained the defendants herein will apply so much of said funds as may be necessary to the extinguishment of the judgment en- [fol. 32] tered in the case of Edmund R. Wells against your complainant, and whereby complainant will be deprived of the same contrary to the forms of law and violative of its right thereto; that the judgment entered in the garnishment case against the Rio Grande, El Paso & Santa Fe Railroad Company, as per its terms, is now enforcible; that demand has been made for the payment thereof, and the said garnishee will comply with said demand unless the enforcement of said judgment and the judgment entered against your complainant be prevented, and that if the amount thereof is so paid, your complainant will have no recourse at law, as it is informed, advised, believes and so alleges that the said Edmund R. Wells is insolvent and the amount of said judgment so paid to him cannot be recovered and that same will not, in the event the above described judgments are set aside and enjoined, be voluntarily returned by the defendants herein; that to withhold said funds or any portion thereof from this complainant and deprive it of the use and benefit

thereof, will be violative of the constitutional immunities to which it is entitled and violative of the acts of Congress hereinabove referred to.

Twenty-second. Your complainant avers that for many years prior to the entry of the final decree in the cause of your complainant against J. F. Weeks, et al., numbered 109 in Equity in this court and above referred to, it had been the practice or usage of attorneys residing in El Paso county to institute suits against complainant in the said courts of said county for injuries to persons occurring in the states of Illinois, Kansas, Colorado, New Mexico, [fol. 33] Arizona and California, and in cases where the injured parties were residing in such states respectively at the time of such injuries, there having been filed prior to the time your complainant exhibited its bill for injunction in its said cause against J. F. Weeks, et al., above referred to, and for and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the state courts of El Paso county for personal injuries occurring as above alleged and in which many thousands of dollars were involved; that during said period, copies of citations in said causes were usually delivered to parties residing in the county of El Paso, Texas, who were alleged to be officers or agents of your complainant, and complainant was compelled to elect between suffering judgments by default in said causes the harassment, annoyance and expense of resisting execution that might be issued thereon, or to appear in said suits in El Paso County, which rendered it necessary in many instances for its employees to leave their regular work in such states and go to El Paso to testify as well as to incur the expense thereof; that during the absence of such employees on such trips to El Paso, substitutes had to be procured for them in their regular work, which, to a greater or lesser extent, disorganized the business of complainant in such other states, and, to some extent, subjected employees, passengers and property in its custody to greater risk for the reason that the regular men were, to some extent, better qualified to safely perform their services than are substitutes, and in other respects, your complainant was subjected to [fol. 34] undue hardship, expense and inconvenience; that since the entry of the final decree in the said cause of your complainant against J. F. Weeks, et al., above described, no such suits have been filed in the District Courts of El Paso County, Texas, until the institution of the one herein complained of; that there never had been and now is no just, lawful or equitable reason or cause why such suits should not have been instituted and prosecuted in the respective states where the injuries occurred, in each of which states complainant, at all the times herein mentioned, has had and now has officers and agents upon whom service of process could have been and now can be had; that there existed in said states and now exist courts of competent jurisdiction in which suits on such causes of action could have been and now can be filed and prosecuted.

And herein complainant avers that the attempted garnishment herein is not a bona-fide effort to reach the assets of complainant,

which is amply solvent and has property more than amply sufficient, subject to execution, in each of the states through which it operates and does business to more than satisfy any demand which the defendant, Edmund R. Wells, may have against it; but your complainant in this behalf avers that the institution of the suit of Edmund R. Wells against it in the District Court of El Paso County, Texas, and the issuance and service of the writ of garnishment therein is a part of a general scheme to re-establish jurisdiction in El Paso County in causes of action such as is declared upon by the said Edmund R. Wells in causes arising in other states against foreign [fol. 35] railroad corporations, and The Atchison, Topeka & Santa Fe Railroad Company, your complainant, in particular; that it was established, as per the final decree entered therein in the said cause instituted in this court of your complainant against J. F. Weeks, et al., above referred to, that your complainant was not subject to the jurisdiction of the courts of El Paso county in causes of action for personal injuries, hence the effort to circumvent the effect of the decision in that cause by the issuance and service of the writ of garnishment as is herein attempted, complainant averring that the institution of said suit of Edmund R. Wells against it and the issuance and service of the writ of garnishment thereon had not for its object the collection of any just demand against your complainant as same could have been litigated and determined and any judgment rendered collected under execution in any of the jurisdictions where complainant is doing business, but that same is an effort by the use of the process of the writ of garnishment under article 247a of the Revised Statutes of the State of Texas, to re-establish jurisdiction in the courts of El Paso County on causes of action for personal injuries against your complainant, a foreign railroad corporation, and for your complainant to submit thereto would greatly burden interstate commerce, hamper it in its business as a common carrier for hire without the state of Texas, and subject it to the great and unnecessary expense, if this effort succeeded, of litigating, far from the scene where causes of action for personal injuries arise against it, and it would be greatly hampered in its defense in that its witnesses [fol. 36] will be required to come for great distances with the added expense, which will be a burden upon interstate commerce, and in addition to which, it will be required to substitute the services of other and less experienced employees for those who are thus required to absent themselves from their usual labors; and, in the event of its inability to secure the attendance of such witnesses within this jurisdiction, it will be deprived of the right to make proper and necessary defense in each, any and all of such causes; that it should not be required to waive its constitutional right which has been invaded, as hereinabove is made to appear; that there never has been and is not now any just lawful or equitable reason or cause why such suits cannot be instituted and prosecuted in the respective states where the injuries occurred and where service can be had upon complainant and where such suits can be fully, freely and fairly litigated and justly determined; but, notwithstanding the above, complainant is informed, believes and so alleges that unless it ob-

tain relief in this Honorable Court, the practice of filing suits of this nature and character in the District Courts of the State of Texas, at El Paso, Texas, on causes of action occurring or to occur to persons in other states and residing in such other states and by the use of the writs of attachment and garnishment or one of the same, will be indefinitely continued to the great harassment, injury, annoyance, cost and expense of complainant; that the conduct of the said Edmund R. Wells in instituting said suit in the District Court of El [fol. 37] Paso County, as well as the conduct of the other respondents herein in instituting said suit within such jurisdiction, is and was as to your complainant a trespass and a wrong to it.

Twenty-third. Complainant represents that its liability for the accident out of which the suit in the District Court of El Paso County, Texas, was filed, is and was doubtful and that it had and has a meritorious defense to the same, there being a grave and serious question as to whether it was at all liable in any sum whatever, on account of the injuries alleged to have been so received.

Twenty-fourth. Forasmuch, therefore, as your complainant is without remedy, save in a court of equity, and to the end that the said defendants and each of them shall be required to make full, complete and direct answer hereto, but not under oath, answer under oath being hereby expressly waived, complainant prays that the defendants and each of them, and each and all of their attorneys and agents, may be enjoined and restrained preliminarily until the final hearing and perpetually thereafter from, in any manner, attempting to enforce the collection of the above and foregoing judgments, or either of them, so rendered in the District Court of El Paso County, Texas, and from attempting, in any manner, to compel the collection of the judgment entered against garnishee herein, or to issue execution thereon, and that the judgment entered against your complainant, as well as the judgment against the garnishee, be, in all things, declared null and void, and of no effect; and that the defendants and each of them, their attorneys and agents, be enjoined [fol. 38] from taking any other step or steps to enforce the collection or payment of said judgments, or either of same, or otherwise attempting to force either the garnishee or your complainant to pay any sum of money in satisfaction of said judgments or either of same, and that further proceedings on the cause of action so declared upon by the said Edmund R. Wells in the District Court of El Paso County, Texas, be held for naught.

May it please Your Honor to grant unto this complainant not only a writ of injunction conformable to the prayer, but also a writ of subpœna of the United States of America, directed to the said defendants and each of them, commanding them on a day certain, to appear and answer this bill of complaint (but not under oath, and to abide by and perform such order and decree in the premises as to the court may seem proper and as required by the principles of equity and good conscience; and, furthermore, as the danger to your complainant is imminent and pressing by reason of the threat of the defendants to immediately enforce collection of the judgment so en-

tered against the garnishee, which, in effect, is to force complainant to pay the judgment entered against it, and as the garnishee is amply solvent and able to respond under execution, having property in El Paso County, Texas, of greater value than the amount of the judgment so entered, and as the issuance of an execution thereon, which is imminent and pressing, will involve expense, vexation and worry, and subject complainant to annoyance and be a burden on [fol. 39] interstate commerce, as well as violative of the constitutional rights of complainant, that a temporary restraining order, as provided by law, may be issued restraining defendants and each of them, their associates and agents, in accordance with the prayer for preliminary and perpetual injunction; that the said temporary restraining order may be served immediately upon each of said defendants named herein; that if the judgment entered by default against your complainant in the District Court of El Paso County, Texas, is enforced by the payment of the judgment entered against the garnishee or otherwise, the loss thereby sustained by this complainant can never be repaired in any way but will be wholly irreparable.

The Atchison, Topeka & Santa Fe Railway Company, By W. B. Storey, Its President; Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Solicitors for Complainant.

STATE OF ILLINOIS,
County of Cook:

W. B. Storey, being first duly sworn, on oath deposes and says that he is President of the complainant, The Atchison, Topeka & Santa Fe Railway Company, in the foregoing bill and agent thereof, authorized to make this affidavit; that he is cognizant of the matters [fol. 40] and things set forth in the foregoing bill of complaint and that the statements therein are true.

W. B. Storey.

Sworn to and subscribed before me, this 1st day of March, 1922. Nelson W. Willard, Notary Public in and for the County of Cook, State of Illinois. (Seal.)

EXHIBIT A-1 TO BILL OF COMPLAINT

THE STATE OF TEXAS,
County of El Paso:

IN THE DISTRICT COURT OF EL PASO COUNTY, FOR THE 65TH JUDICIAL DISTRICT OF TEXAS, NOVEMBER TERM, 1921

To the Honorable Ballard Coldwell, Judge:

Your petitioner, Edmund R. Wells, hereinafter styled plaintiff, complaining of the Atchison, Topeka & Santa Fe Railway Company, hereinafter styled defendant, for cause of action would respectfully represent unto the court:

I

That plaintiff is a citizen of La Junta, in the State of Colorado, where he resides and has his domicile; that the defendant is a foreign corporation, duly and legally incorporated under the laws of the State of Kansas, and is a citizen of said State, where it has its domicile, and maintains its general office in Topeka, Kansas, where E. L. Copeland, its secretary and treasurer, maintains his office and [fol. 41] place of business as such secretary and treasurer.

II

That heretofore, on and prior to the 25th day of March, 1921, and subsequent to said date, defendant was a railway corporation, and engaged in running and operating and owning the line of railroad extending from Anthony, New Mexico, northerly, through the State of New Mexico, and maintained an office and local agent at Las Cruces, Dona Anna County, State of New Mexico, and that on or about the 25th day of March, 1921, it employed a large number of persons who were engaged in running and operating defendant's line of railroad into and through the State of New Mexico, and other persons whose business it was to assist in managing and operating defendant's line of railroad.

III

That on or about the 25th day of March, 1921, and prior thereto, plaintiff was employed by the defendant as a special officer, and while engaged in his duties incident to his employment, at San Marcial, New Mexico, he met with an accident and was seriously injured as is more fully hereinafter set out.

IV

Plaintiff avers and charges that on or about said 25th day of March, 1921, while engaged in the duties incident to his employment, he was called by one of defendant's employees, who at that time was engaged in assisting in operating one of defendant's passenger trains; that said employee at that time was standing on the [fol. 42] platform of one of the cars composing said passenger train, and when he called to this plaintiff it was plaintiff's duty, as said special officer, to go to said employee, in order to ascertain what duties, if any, said employee desired plaintiff to perform for the defendant, and in response to said call plaintiff mounted said platform, in order to confer and converse with defendant's said employee; that soon after he boarded said passenger car the train started, and plaintiff, having conversed with said employee, it became the right or duty of plaintiff, in his discretion as such special officer of defendant, to immediately leave the train, and he decided to do so, and while attempting to dismount from said moving train to the platform maintained at San Marcial, for the purpose of mounting

and dismounting passenger trains, and while in the exercise of due care for his own safety, he stepped into a hole or depression in said platform, and was thrown or caused to fall in such a manner as to receive the injuries hereinafter set out; and plaintiff avers and charges that it was the duty of said defendant to provide for his use, as well as the use of all other persons who might be lawfully mounting or dismounting a passenger train at San Marcial, a reasonably safe and suitable platform, on which to mount and dismount passenger trains, free from all holes, depressions or other obstruction and to inspect said platform, or cause same to be inspected, repaired and kept in a reasonably safe condition; but plaintiff avers and charges that the platform and place where he attempted to alight from said moving train had become unsafe and dangerous, by reason [fol. 13] of the fact that defendant had allowed and permitted a hole or depression to be and remain in said platform, and had failed and neglected to inspect the same, or cause same to be inspected, repaired and kept in a reasonably safe condition; that said defendant and its duly authorized agents were guilty of negligence in allowing and permitting said hole or depression to be and remain in said platform, of such a size, width and depth, and in such a position and location that any person who might be lawfully attempting to alight from a moving passenger train could step into, or be thrown into same, in the manner and way in which plaintiff stepped into same and was thrown at the time of the happening of said accident, and was guilty of negligence in not filling up said hole or repairing said platform, and making same reasonably safe for use, which said negligence and negligent acts and omissions on the part of the defendant was the direct and proximate cause of plaintiff's accident and consequent injury, for which the defendant is liable. Plaintiff says at the time of the happening of the accident he was rightfully on said passenger train, and had a legal right to mount and dismount the same at said time and place; that while he was in the act of stepping from said slowly moving train his foot or feet struck in the said hole and came in contact with same, whereby and in consequence thereof he lost his equilibrium and was thrown and caused to fall, and struck on the hard sidewalk or platform with great force and violence, whereby and in consequence thereof his knee and knee cap and the bones and ligaments thereof were broken, injured, strained and seri- [fol. 14] ously and permanently injured, rendering his leg and knee weak and practically useless.

V

Plaintiff says that at the time of the happening of said accident he was a strong, healthy, able-bodied man, earning and capable of earning a lucrative salary; that by reason of said injury he is now totally incapacitated for following his business or calling, and for doing any hard manual labor, and has thereby suffered great pecuniary loss; that he has suffered, and will continue to suffer in future, great bodily pain and mental anguish. Plaintiff says by

reason of the aforesaid facts he has been damaged in the total sum of fifteen thousand dollars.

Wherefore, plaintiff prays that the defendant be cited to answer this petition, and that on final hearing hereof he have judgment for his damages and costs of suit.

Lee, McGrady, Thomason & Edwards, Hudspeth, Wallace & Harper, Attorneys for Plaintiff.

Geo. E. Wallace being duly sworn says that the defendant, Atchison, Topeka & Santa Fe Rail Company the defendant is a corporation and is a non-resident of the State of Texas.

Geo. E. Wallace.

Sworn to and subscribed by affiant before me this 7th day of Oct., 1921. C. M. Harper, Clerk Dist. Court. By R. M. Harvey, Dpy.

[fol. 45] "EXHIBIT B" TO BILL OF COMPLAINT

(Title of Court and Cause)

THE STATE OF TEXAS,
County of El Paso:

Before me, the undersigned authority, on this day personally appeared George E. Wallace, who being duly sworn, says:

That he is attorney for plaintiff in the above styled and numbered cause, and that an original attachment has been issued in the above styled and numbered cause, as provided in chapter 1, title 11, of the Revised Statutes of the State of Texas, as shown by the records and files in this cause, to which reference is here made, and the same are made a part hereof.

Affiant further says that he and plaintiff have reason to believe and do believe that the Rio Grande, El Paso & Santa Fe Railway Company, a corporation doing business and having an office and local agent and its residence in El Paso County, Texas, is indebted to the defendant the Atchison, Topeka & Santa Fe Railway Company, and has effects belonging to said Atchison, Topeka & Santa Fe Railway Company in its possession, in El Paso County, Texas; and plaintiff prays for a writ of garnishment to issue and summons said Rio Grande, El Paso & Santa Fe Railway Company as garnishee in this cause.

Geo. E. Wallace, Attorney for Plaintiff.

Subscribed and sworn to before me by affiant, on this the 7th day of October, 1921. Eunice Hamilton, Notary Public, El Paso County, Texas.

[fol. 46] EXHIBIT C TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

No. 21137

EDMUND R. WELLS, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant; Rio Grande, El Paso & Santa Fe Railway Company, Garnishee

Comes now the Rio Grande, El Paso & Santa Fe Railroad Company, denying in its behalf the jurisdiction of the court herein to issue and cause to be served the writ of garnishment so issued and served, and thereon represents:

I

That the original defendant, on all of the dates herein mentioned and on all of the dates described in plaintiff's original petition, and in the affidavit for garnishment and the writ thereon issued, is and was a foreign railroad corporation existing under the laws of the state of Kansas and having its principal office and place of business in the county of Shawnee, in said state; that it had and has no line of railroad extending into or through the state of Texas, no agents therein, and was not, at the time of the accident out of which this suit arose, nor is it now, doing business within said state; that the cause of action resulting in this suit against said defendant arose in the state of New Mexico, and did not arise in the state of Texas; that said cause of action is based upon an unliquidated demand, same be-[fol. 47] ing an action for personal injuries alleged to have been received in the state of New Mexico; that because of these facts, the original defendant herein is not liable in this court nor in any court within the state of Texas, and the service of process in said cause upon said defendant did not and does not confer jurisdiction upon this or any other court in the state of Texas to hear and determine the cause as between the plaintiff and the defendant, or to render a judgment against said defendant, and because of which, the garnishment suit filed against this garnishee is not maintainable herein.

In this behalf this garnishee would further show unto the court that in the state of Colorado, where plaintiff resides and of which state he is a citizen, as well as in the state of New Mexico where the alleged cause of action asserted against the original defendant arose, said defendant is doing business and there are many courts wherein said plaintiff may assert his alleged cause of action and obtain and have judgment over and against said defendant.

In this connection, garnishee represents that said defendant is financially able to respond in satisfaction of any judgment that might

be so recovered by the plaintiff; that in each or either of said states of Colorado and New Mexico, said defendant has property subject to execution, of value many thousand times greater than any liability that might be found to exist against it on the cause of action asserted or that might be asserted by said plaintiff.

[fol. 48]

II

Relying upon the allegations in paragraph I hereof, garnishee further represents that the service of the writ of garnishment herein served upon it did not and does not confer jurisdiction upon the court over the defendant, or to hear and determine the cause of action declared upon.

(a) said suit being based upon an unliquidated demand for damages for personal injuries, there is and was no authority in law for the issuance and service of said writ of garnishment, same fixed no lien upon any properties of the defendant, and no jurisdiction is thereby conferred upon this court over said defendant or the cause of action declared upon, and any statute of the state of Texas which undertakes to confer such authority and to give jurisdiction herein is void, and for this court to undertake to enforce the same, will and would deprive said defendant of its property without due process of law, and will and would be a denial to said defendant of the equal protection of the law, as required under the fourteenth Amendment to the Constitution of the United States, and said plaintiff is not entitled to receive aid herein from or by virtue of any statute of the state of Texas;

(b) the funds and property sought to be held under the writ of garnishment herein served are not subject to said writ; said funds belong to the defendant for service performed wholly without the state of Texas and in the conduct of its interstate business as a common carrier, and represent its proportion due from this garnishee [fol. 49] as a connecting carrier of its interstate transportation charges, and no lien became or is fixed thereon by virtue of issuance and service of the writ of garnishment herein, and any properties sought to be impounded thereunder are used exclusively in the conduct of its business as an interstate carrier of freights and passengers and are therein needed and essential in such transportation and without which said defendant will and would be deprived of the use and benefit thereof in and under its obligations crested and existing by law in the performance of its duty as a common carrier, and as will be more specifically described in another paragraph hereof;

(c) articles 247a and 248 of the Revised Statutes of the State of Texas are wholly inapplicable to the facts of this case as same appear from plaintiff's original petition, and to construe the same or either thereof as authorizing the issuance and service of the writ of garnishment under the facts of this case, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended,

and the Transportation Act of 1920. The legislature of Texas was and is without power to fix jurisdiction over said defendant on the cause of action declared upon, as well as to fix any lien on and against any funds or property belonging to said defendant and that may be in possession of garnishee; and to construe said articles of the Texas statute or either of same as so authorizing, would and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920;

[fol. 50] (d) articles 247a and 248 of the Revised Statutes of Texas are void because thereunder judicial power is conferred upon the clerk of the court, and to apply and enforce the same hereunder will and would deny to said defendant the equal protection of the laws required under the Constitution of the United States;

(e) the issuance and service of the writ of garnishment herein conferred no jurisdiction upon this court or any other court within the state of Texas over the defendant of the cause of action declared upon, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded because no judgment had been obtained against said defendant by the plaintiff prior to the issuance of said writ, and no valid judgment can be obtained against said defendant.

III

Garnishee further represents that the attempted garnishment herein is not a bona fide effort to reach the assets of the defendant, The Atchison, Topeka & Santa Fe Railway Company, same being amply solvent, as hereinabove appears, but is part of a general scheme to establish jurisdiction in El Paso county in causes of action such as is declared upon by this plaintiff on causes of action arising in other states against foreign railway corporations, and The Atchison, Topeka & Santa Fe Railway Company in particular, there being courts of competent jurisdiction within each and every state through which the said The Atchison, Topeka & Santa Fe Railway Company may operate or in which it is doing business, in which litigant may [fol. 51] receive such redress for alleged wrong as the law may warrant, and to allow the use of the courts in El Paso county for this purpose will unnecessarily burden the same as well as work a great hardship upon said railway company in that it will be required to expend greater sums of money than would be necessary were said causes prosecuted in a jurisdiction wherein said railway company is doing business, and this will deprive and tend to deprive it of its property without due process of law, and to make necessary defense, if said suits are prosecuted within this jurisdiction, will require the attendance of witnesses at great distances from home, and it will be necessary for its employees, material in such action or actions, to absent themselves from their usual and customary labors a greater length of time than would ordinarily be necessary, and said railway company would thus be deprived of their services for a greater length of time, which will be added expense to said railway company, and

all of which expenses, as herein enumerated, will be a burden upon interstate commerce, deprive defendant at the time being of experienced employees in the handling and to the detriment of interstate commerce, and, in the event said railway company is not able to secure the attendance of such witnesses within this jurisdiction, it will be deprived of the right to make proper and necessary defense in each, any, and all of said causes.

And in this behalf, garnishee represents that it is advised, informed and so alleges that it has been judicially determined that the said The Atchison, Topeka & Santa Fe Railway Company, defendant [fol. 52] herein, is not subject to the jurisdiction of the courts of El Paso county in causes of action such as is herein declared upon, and that this fact is known to the plaintiff and to the attorneys of record representing him, and that the bringing of this action against the defendant in and under these circumstances, is another and further annoyance to it, as well as a hindrance, and same will be a hindrance to it in the conduct of the business it is required to conduct by law.

IV

Subject to the defenses herein interposed, and relying upon the facts alleged, garnishee represents that at the time the writ of garnishment herein was served upon it and at all times since and now, it was and is indebted to The Atchison, Topeka & Santa Fe Railway Company, defendant herein, in the net sum of one hundred and fifty thousand, one hundred and sixty nine and 86/100 ($150,169.86); that same is made up of traffic balances due from garnishee to said defendant, accruing in the transportation of freights and passengers wholly without the state of Texas; that said funds belong to the defendant as its proportion of the gross earnings from transportation of freights and passengers exchanged between garnishee and defendant for and during the period covered by said writ of garnishment; that each and all of same was earned by said defendant and accrues to it on its interstate business, the service therefor being performed and said amounts accruing to it for service performed wholly without the state of Texas, and that each and all of said funds are by said defendant needed in the conduct of its business as [fol. 53] interstate carrier and in the performance of the obligations required of it by law and the rulings of the Interstate Commerce Commission, and the laws of the various states through which it operates and in which it does business.

Garnishee would further show to the court that at the time the writ herein was served, and at all times since, it had and has in its possession railroad cars, engines and other equipment belonging to the defendant, which railroad cars, engines and other equipment were and are used continually in the conduct of its transportation business; that it received and now received from the defendant, said railroad cars, engines and other equipment under an agreement or arrangement between it and the defendant, entitling it, the garnishee, to the use and possession thereof in the conduct of its business as a common carrier while so in its possession, and that without the same

it would have been and will now be unable to conduct its business as a common carrier and perform the obligations and duties imposed upon it as such by the law, both in its interstate and intra state business; that under its arrangement or agreement with the defendant, it had and has the right to dispatch said railroad cars, engines and other equipment to the place of destination on its own line and is not required to transfer freights or passengers to its own cars for further and final transportation; that it used and uses the empty cars so coming to it for the carrying of freights and passengers between different points on its own line and on the lines of other railroad companies directly or indirectly connected with either its line or that of the defendant, upon the payment of fixed charges therefor; [fol. 54] that said railroad cars, engines and other equipment while so in its possession on its own line, are, for the purposes of transportation and the time being, part of its equipment and to the possession and use thereof as such it is entitled and of which it will be deprived under the process herein issued if final judgment herein may or shall be entered against it; that each and all of the railroad cars, engines and other equipment herein described were and are in daily use by garnishee in the conduct of its business as a common carrier; that garnishee is unable to say the number of railroad cars, engines or other equipment which it ordinarily had or has in its possession at any particular date, nor to give a more definite or better description thereof than to say that same consists of box and flat cars, passenger, baggage, mail and express cars, and railroad locomotives, and that on November 2, 1921, it so had in its possession forty-six box cars, sixteen stock cars, ninety-eight coal cars and one flat car belonging to the defendant; that each and all of said cars were so in the possession of garnishee under the contract, arrangement and agreement which it has with the defendant, and each and all of same were in use exclusively in the handling of interstate and foreign commerce and to the possession and use of same and each of same, said garnishee was entitled, as hereinabove averred in general terms; and that also, on said 2d day of November, 1921, it had in its possession a freight engine engaged in road service belonging to said [fol. 55] defendant, said engine being so in its possession under the agreement and understanding between garnishee and defendant hereinabove referred to, and same is and was used exclusively in the handling of interstate and foreign commerce, and to the use and possession of same, said garnishee was and is entitled to same, and without the same it could not conduct its business as a common carrier and as required by law, and that on said November 2, 1921, it likewise had in its possession four passenger road engines which belonged to the defendant and which had been delivered to garnishee and were at that time in its possession under and by virtue of the arrangement and agreement between it and the defendant hereinabove referred to, each and all of said engines being used in the handling of the interstate business and in the handling of passenger trains so engaged by it and the defendant, and to the use and possession of same it was and is entitled, and that to deprive it of such use, would be to hinder, delay, impede and retard its business as a

common carrier interstate of passengers, and same would be violative of the terms and conditions of the contract under which it held possession thereof; that on said date, it likewise had in its possession four switch engines working and operating as such in its yards at El Paso, Texas, each and all of said engines being engaged in interstate and foreign commerce business of garnishee, and all so in its possession under and by virtue of the contract and agreement between it and the defendant and without which it could not make up its trains or distribute cars or make deliveries thereof as in duty bound [fol. 56] it is and was required to do; that each and all of said engines, as well as the other equipment hereinabove referred to, is and was in daily use in interstate and foreign commerce, and that the seizure of them or any of them under process would necessarily interrupt the handling of such commerce.

Garnishee further avers that other engines and cars were and are used in trains operated across the state lines dividing the state of Texas and the state of New Mexico at which point this line connects with that of the defendant company; that each and all of same were in the possession and use of garnishee under the agreement and arrangement between it and the defendant company hereinabove averred and to the use and possession of each and all of same, said garnishee was and is entitled; that the state business done and transacted by this garnishee is very small and forms but a light proportion of the total business done and transacted by it as a common carrier, so that each and all of the engines and cars belonging to defendant and in the possession of garnishee as hereinabove averred, were and are practically at all times engaged in interstate and foreign commerce, and that the seizure of the same would necessarily interfere with and interrupt the interstate and foreign commerce.

Garnishee is unable at this time to more definitely aver and allege the equipment in its possession belonging to the defendant, The Atchison, Topeka & Santa Fe Railway Company, at any time but does aver and allege that at each and all of the times set out and men- [fol. 57] tioned in the writ of garnishment herein served upon it, it had and has in its possession railroad equipment which, and all of which, is used in the handling of its interstate and foreign commerce and of far greater value than the amount claimed and demanded by the plaintiff in his suit against the defendant.

Except as hereinabove referred to, and in the manner and form that same is averred, garnishee has no other effects of the defendant, The Atchison, Topeka & Santa Fe Railway Company, in its possession and did not so have when the writ herein was served upon it; that it does not know of any other persons who are indebted to said The Atchison, Topeka & Santa Fe Railway Company or who have effects belonging to it in their possession.

Wherefore, comes now the garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, and says that for the above and foregoing reasons and each of them, jointly and severally, this court has no jurisdiction of the defendant, The Atchison, Topeka & Santa Fe Railway Company, nor of this garnishee; that the funds hereinabove described are not subject to the writ of garnishment served nor are

the other property and effects so subject; that it should not be held liable herein; that no lien was had or became fixed upon and against any of said funds or other property by reason of the issuance and service of the writ of garnishment herein; that no valid judgment can be rendered against said defendant to which same can be applied, and it therefore prays that it go hence and be discharged on this, [fol. 58] its answer, and that it be allowed a reasonable attorney's fee in this behalf.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Garnishee, Rio Grande, El Paso & Santa Fe Railroad Company.

The State of Texas,
County of El Paso:

Before me, the undersigned authority, on this day personally appeared R. F. Goering, who, on oath, deposes and says that he is the general manager of the Rio Grande, El Paso & Santa Fe Railroad Company, garnishee in the suit of Edmund R. Wells, vs. The Atchison, Topeka & Santa Fe Railway Company, defendant, and agent of said garnishee, authorized to make this affidavit, and that the facts stated in the above and foregoing answer in garnishment are true and correct.

R. F. Goering.

Sworn to and subscribed before me this 5th day of November, 1921. C. W. Harper, Dist. Clerk in and for El Paso County, Texas.

[fol. 59] Exhibit D to Bill of Complaint

District Court, El Paso County, 65th Judicial District

No. 21135

Edmund R. Wells

vs.

Atchison, Topeka & Santa Fe Railway Company.

21st December, 1921.

Be it remembered on this day this cause was called for trial in 65th District Court of El Paso County. Plaintiff appeared in person and by attorneys but defendant failed to appear or answer although duly cited by publication and duly cited by service of non-resident notice upon it in the state of Kansas. And the court on a former day of this term, having appointed E. F. Cameron and Robt. T. Neill, attorneys of this court, to represent the defendant, a non-resident of Texas, cited by publication, they appeared under such appointment by the court and defended upon behalf of defend-

ant. A jury being waived, after completing the evidence the court finds for plaintiff $1,000.00 damages against defendant.

It is therefore adjudged by the court that plaintiff, Edmund R. Wells, recover of the defendant, Atchison, Topeka & Santa Fe Railway Company, a corporation, $1,000.00 damages with 6 per cent per annum interest thereon and all costs of this suit, including a fee of $600.00 now allowed to Cameron and Neill for representing the defendant, and ordered taxed as costs.

It is ordered that the statement of the evidence introduced be made up and approved and filed in this court.

It further appearing that at the time of filing this suit, the plain-[fol. 60] tiff sued out an original attachment against the defendant or its property and afterwards on the same day caused to be issued a writ of garnishment summoning the Rio Grande, El Paso & Santa Fe Railroad Company to answer as garnishee what if anything it was indebted to the defendant, etc., which writ was duly served upon said garnishee in El Paso County, Texas, on the day of its issue and which garnishment proceeding is numbered 21,137 on the docket of this court, styled Edmund R. Wells vs. Rio Grande, El Paso & Santa Fe Railroad Company and said garnishee having answered showing that at time of service of said writ it was indebted to defendant in a sum far in excess of the amount of said judgment and all costs and had in its possession effects of defendant.

It is therefore adjudged by the court that the above recovery adjudgment in favor of plaintiff against the defendant, Atchison, Topeka & Santa Fe Railway Company is only effective against said defendant to the extent that the same may be satisfied out of said garnishment proceeding against the above named garnishee, and that no execution issue on said judgment against said original defendant save in so far as may be permitted or authorized by order of this court in said garnishment proceeding, this court not having yet determined to what extent it will render judgment against said garnishee.

[fol. 61] EXHIBIT E TO BILL OF COMPLAINT

No. 21137

(Title of Court and Cause)

On this, the 24 day of Jan., 1922, came on to be heard the above styled and numbered cause, plaintiff appearing by attorney and garnishee appearing by attorney, and both parties having waived a jury and agreed to submit the issues of fact as well as of law to the court without a jury; and upon an agreed statement of facts, and the court having considered the same and argument of counsel, is of the opinion that plaintiff is entitled to recover; that the defenses interposed by the garnishee in its answer are not well taken and that under the facts appearing and applicable — law, it is liable herein to plaintiff, and it being made to appear that plaintiff had

heretofore and on to-wit, December 21st, 1921, recovered a judgment in this court against the defendant, The Atchison, Topeka & Santa Fe Railway Company, in the sum of four thousand dollars ($4,000) and costs of suit, and that the garnishee was indebted to the defendant and had assets in its possession belonging to the defendant of far greater value than the amount of said recovery, the court is of the opinion that plaintiff should recover herein against the garnishee in the amount of the judgment heretofore obtained by him against the said defendant, The Atchison, Topeka & Santa Fe Railway Company.

It is therefore considered, ordered and adjudged by the court that the plaintiff, Edmund R. Wells, do have and recover of and from [fol. 62] the Rio Grande, El Paso & Santa Fe Railroad Company, garnishee, the sum of four thousand dollars ($4,000), together with all costs of suit, as well as costs incurred in the suit of Edmund R. Wells vs. The Atchison, Topeka & Santa Fe Railway Company, hereinabove referred to; that this judgment bear interest at the rate of six per cent per annum until paid, and for all of which, let execution issue.

It is the further order, judgment and decree of this court that when the above and foregoing judgment is paid and satisfied in full, said payment and satisfaction shall likewise be in full payment, satisfaction and discharge of the judgment hereinabove referred to, and as entered in this court in the case of Edmund R. Wells vs. The Atchison, Topeka & Santa Fe Railway Company and numbered 21,135 on the docket thereof; to all of which and to the entry of this judgment, as well as the conclusions of law thereon, here and now filed by the court, said garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, in open court duly excepted and gave notice of appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas.

Ballard Colwell, Judge.

[File endorsement omitted.]

[fol. 63] In the District Court of the United States, at El Paso, Texas

[Title omitted]

Defendants' Answer—Filed Mar. 22, 1922

Now come the defendants and for answer to the plaintiff's bill of complaint filed herein, they say:

1. They do not admit the truth of any of the allegations of the bill stating conclusions of law or conclusions of fact nor what the laws of Texas are.

2. These defendants deny the allegation in paragraph Ninth of the bill which conveys the idea that the judgment therein men-

tioned was claimed or sought to be enforced by the defendants to any extent other than subjecting the debt owing by the garnishee to the plaintiff in this suit.

3. These defendants say that such judgment was only valid to the extent of the debt or funds impounded by the writ of garnishment referred to in the bill, and these defendants have never made any other contention.

4. These defendants deny that part of paragraph Thirteenth of the bill in substance claiming that no valid citation or process was ever served upon the defendant in the suit of Wells against the Atchison, Topeka & Santa Fe Railway Company.

5. These defendants say that the facts are that citation by publication, as well as service of notice beyond the limitations of Texas were both properly served in that case.

[fol. 64] 6. These defendants deny all the allegations in paragraph Fifteenth of the bill, and they say that the statute there attacked being Article 247a is not in conflict with any act of Congress or rule of the Inter-state Commerce Commission.

7. These defendants deny the allegations in paragraph Nineteenth of the bill, and they especially deny the funds there referred to would be needed by the plaintiff in the carrying on of its business as a common carrier either within or without the State of Texas, and deny that the plaintiff is required to conduct any business, inter-state or otherwise, that would require the use of such funds, and deny that there is any law or any rule of the Interstate Commerce Commission that would require it to use such funds as a common carrier or in order to operate any of its other business, and deny that the withholding of such funds by garnishment or judgment would violate any law or any rule of the Inter-state Commerce Commission or would deprive the plaintiff of its ability to perform any of its services as a common carrier, and deny that the plaintiff needs such funds in the operation of its business as a common carrier, and deny the allegation that the funds were not subject to garnishment.

8. These defendants deny that it was necessary for the plaintiff to have the funds so impounded in order that it might properly serve El Paso and its commerce without subjecting it to any undue prejudice, disadvantage or discrimination, and defendants deny that it was necessary that the garnishee should collect freight charges for [fol. 65] the plaintiff or that the garnishee should sell tickets over the road of the plaintiff.

9. These defendants deny that the enforcement of the judgment in question will impede or hinder the plaintiff in the performance of its duties as a carrier imposed upon it by any law or rules of the Inter-state Commerce Commission.

10. These defendants deny the allegation in paragraph Twenty-second of the bill, to-wit, that there is no just, lawful or equitable rea-

son why suit should not have been prosecuted in the respective states where the injuries occurred, and deny the allegation that the attempted garnishment is not a bona fide effort to reach the assets of the plaintiff, and deny the allegation that the suit brought by Wells is a part of a general scheme to establish jurisdiction in El Paso County in causes of action such as declared upon by him arising in other states, and they deny the allegation that the garnishment so sued out by Wells had not for its object the collection of any just demand against the plaintiff, and deny the allegation that suits in Texas against the plaintiff would subject it to great and unnecessary expense. The defendants say that the plaintiffs could always take depositions and it is never necessary to have the witness attend in person, and the defendants deny the allegation that it materially interferes with the right of defendant to carry on its business as a common carrier while its witnesses are attending court in Texas.

11. These defendants deny the allegation in paragraph Twenty-[fol. 66] third of the complaint alleging that plaintiff had a meritorious defense to the suit brought by Wells against it.

Wherefore, these defendants pray that the plaintiff take nothing and that its complaint be dismissed upon the merits at the cost of the plaintiff, and for all other relief to which these defendants are entitled.

Geo. E. Wallace, J. G. McGrady, Lea, McGrady, Thomason & Edwards, Attorneys for Defendants.

[File endorsement omitted.]

In the District Court of the United States, Western District of Texas, El Paso Division

[Title omitted]

Request for Submission of the Merits—Filed Mar. 22, 1922

Come now the complainant and defendants and represent that, as this cause is now at issue, the defendants having answered fully herein, and the facts having been developed and said cause submitted upon an agreed statement of facts, and request the court that [fol. 67] such judgment as may be entered be a final judgment upon the merits of the cause.

Wm. H. Burges, A. H. Culwell, Attorneys for Complainant. Geo. E. Wallace, Lea, McGrady, Thomason & Edwards, Attorneys for Defendants.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

[Title omitted]

STATEMENT OF FACTS—Filed Mar. 16, 1922

It is agreed that this cause may be submitted upon the following statement of facts:

First

Edmund R. Wells, through his attorneys, Hudspeth, Wallace & Harper and Lea, McGrady, Thomason & Edwards, filed suit in the District Court of El Paso County, Texas, October 7th, 1921, against the Atchison, Topeka & Santa Fe Railway Company for damages growing out of personal injuries alleged to have been sustained on the [fol. 68] 25th day of March, 1921, a copy of the petition so filed is attached to Complainant's Bill herein, marked "Exhibit A," and said copy may be considered as evidence thereof; said plaintiff caused notice to a non-resident defendant, as authorized under the Texas Statute, together with a certified copy of his petition in said cause, to be delivered to E. L. Copeland, Secretary and Treasurer of the Atchison, Topeka & Santa Fe Railway Company at Topeka, Kansas on the 13th day of October, 1921, and in addition thereto service by publication after proper affidavit was filed was had in said cause by publication of said citation in the Labor Advocate, a newspaper published in El Paso County, Texas, which said publication was made for the length of time required under the laws of the State of Texas; that on the date said suit was filed the plaintiff therein, through one of his attorneys, made affidavit for an attachment as provided under Title 11, Chapter 1, Article 247A of the Revised Statutes of the State of Texas, said Article 247A of said Statute is correctly set out in Paragraph 6 of Complainant's Bill herein, and therewith filed his bond as provided for in said Article, same being in the sum of $31,000.00 as fixed by the Judge of said Court, which said bond was approved by the Judge and the Clerk of said Court, and thereunder a writ of attachment was forthwith issued as prayed for, which said writ of attachment was placed in the hands of the Sheriff of El Paso County, Texas, said writ requiring the said Sheriff to levy on any goods, lands, tenements or other property of the said defendant, Atchison, Topeka & Santa Fe Railway Company, [fol. 69] found in or situated in El Paso County, Texas; that said writ of attachment was returned on the 7th day of October, 1921, by said Sheriff "No property of the defendant in said writ found in El Paso County, Texas"; that based upon the affidavit and writ and bond for attachment as hereinabove described said plaintiff, by his attorney, made affidavit, a copy of which is attached to Complainant's Bill herein, and Marked "Exhibit B" for identification, and thereon caused to be issued a writ of garnishment directed Sheriff or any Constable of El Paso Co., commanding him to summon the Rio Grande,

El Paso & Santa Fe Railway Company, Garnishee, which said writ was duly served, and in response to which said Garnishee filed its answer, a copy of which answer so filed being attached to Complainant's Bill herein, and Marked "Exhibit C."

Second

That the Atchison, Topeka & Santa Fe Railway Company on all the dates mentioned in Plaintiff's original petition, as well as before and since said time, is and was a foreign railroad corporation existing under the laws of the State of Kansas, and having its principal office and headquarters in the County of Shawnee, said State, and a citizen thereof; that it had and has no line of railroad extending into or through the State of Texas and no Agents therein, and was not at the time of the accident out of which said suit arose nor is it now doing business within the State of Texas; that the cause of ac-
[fol. 70] tion made basis of said suit arose in the State of New Mexico, where the said Edmund R. Wells was then employed by the said Railway Company; that each and all of the defendants named in the Bill of Complaint filed herein are citizens and residents of the State of Texas, and of the Western District, El Paso Division of this Court; that at the time of the accident, out of which the suit of Wells against the Railway Company filed in the District Court of El Paso County, Texas, arose the said Wells was a resident of the State of Colorado; That the cause of action declared upon therein was an unliquidated demand; that there were and was in the State of Colorado, of which State plaintiff was a resident at the date his suit was filed in the State Court, as also there were and now are in the State of New Mexico, where the alleged cause of action arose, Courts wherein said plaintiff might assert his alleged cause of action and obtain and have jurisdiction thereon against the Atchison, Topeka & Santa Fe Railway Company; that the said Atchison, Topeka & Santa Fe Railway Company is and was financially able to respond and was so able at all of the dates hereinabove referred to in satisfaction of any judgment that might be so recovered by the said Wells; that the Atchison, Topeka & Santa Fe Railway Company has in the States of Colorado and New Mexico, and at all of the dates hereinabove referred to did have, property subject to execution of value many thousand times greater than any liability that might be found to exist against it on the cause of action asserted.

[fol. 71] Third

That the defendant, Atchison, Topeka & Santa Fe Railway Company, did not appear at the November Term of said District Court of El Paso County, Texas, nor on November 7th, 1921, as cited, and did not, in any way, manner or form, enter its appearance or subject itself to the jurisdiction of said District Court of El Paso County, Texas, in said cause of Edmund R. Wells against it, and did *not* act or thing indicating that it had in any way been properly cited to appear and answer in said suit and cause, or that it was

subject to the jurisdiction of the District Court of El Paso County, Texas, in said cause; nor has it ever entered such appearance nor in any way subjected itself to the jurisdiction of said court in said cause; that because of the failure and refusal of said defendant, Atchison, Topeka & Santa Fe Railway Company, to so appear, the Court, on the 8th day of November, 1921 in pursuance to Article 1941 of the Revised States of the State of Texas, which reads as follows:

Art. 1941. (1316.) (1212, 1315.) Procedure in Case of Service by Publication Where no Answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and signed by the judge, (Id. 724) shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit.

appointed E. F. Cameron and Robert T. Neill, attorneys, to defend the said suit in behalf of the defendant"; that the appointment of said attorneys was never at any time authorized or ratified by the defendant, and the judgment was, in fact and in law, a judgment without appearance by or in behalf of the said Atchison, Topeka & Santa Fe Railway Company.

Fourth

That the plaintiff in said cause, Edmund R. Wells, acting by and through his attorneys of record the other defendants herein, secured and took judgment by default in said cause against said Railway Company on December 21st, 1921 for the sum of Four Thousand Dollars ($4,000.00), a copy of said judgment so taken is attached to Complainant's Bill of Complaint and marked "Exhibit D" for identification, and demand has been made for the payment of the same, written notice to that effect having been served upon attorneys, for Complainant herein by the said defendants; That the defendants, Hudspeth, Wallace & Harper and Lea, McGrady, Thomason & Edwards, by assignment, have an undivided one-third interest in the judgment so recovered and above described.

That on January 24th, 1922 judgment was entered in the case of (Id. 731) Edmund R. Wells against the Rio Grande, El Paso & Santa Fe Railway Company, Garnishee, by and under which the defenses interposed by said Garnishee in its answer to the writ of garnishment, said answer hereinbefore referred to as "Exhibit C," were held for naught, each and all of the defenses being overruled, and by and under the terms of the decree so entered said Garnishee was held liable to plaintiff to the extent of the amount recovered by plaintiff against the defendant, Complainant herein, and said judg-

ment so entered in the suit against the Rio Grande, El Paso & Santa Fe Railway Company, as Garnishee, is now a demand against the said Garnishee, and likewise a demand against the Atchison, Topeka & Santa Fe Railway Company, as and by the terms of said decree so entered in said garnishment suit the funds necessary to satisfy the judgment entered in the case of Edmund R. Wells against the Atchison, Topeka & Santa Fe Railway Company, and in the hands of Garnishee, are being and will be with-held by said Garnishee from the Atchison, Topeka & Santa Fe Railway Company, and it has been and is deprived of the use and benefit thereof, a copy of the judgment entered in said Garnishment suit is attached to Complainant's Bill of Complaint herein and marked "Exhibit E" for identification; that the funds and property sought to be held under said writ of garnishment belong to the defendant, Atchison, Topeka & Santa Fe Railway Company, for services as a common carrier performed wholly without the State of Texas, and in the conduct of [fol. 74] its inter-state business as a common carrier, and the funds so sought to be held and which funds are impounded under the judgment hereinabove described represent its proportion due as connecting carrier on its interstate transportation charges.

Fifth

That the Atchison, Topeka & Santa Fe Railway is and was at all the dates herein referred to a common carrier for hire, doing business as such in the states of Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, New Mexico, Arizona and California and in each and all of said State said Railway Company had and has property subject to execution of far greater value than sufficient to satisfy any damage that the plaintiff Wells might sustain, and in each and all of which said States there were and are Courts of competent jurisdiction to hear and determine any cause which he might present; that in said cause, the witnesses in behalf of the Railway Company material to its defense was and were its employees whose attendance as witnesses would be necessary in the opinion of the defendant, and during which attendance they will be required to absent themselves from their usual and customary labors and said defendant would be deprived of their services from such ordinary and customary labors during the time of their attendance upon Court; that if the defendant should elect to bring them into Court in person, for such attendance in Court said defendant would be required to pay them their expenses, and a reasonable compensation [fol. 75] for their loss of time in such attendance upon Court and that the witnesses necessary for such defense in any cause filed by Wells growing out of the accident in question reside at San Marcial, New Mexico, one hundred and fifty (150) miles from El Paso, and are four (4) in number.

Sixth

That the said Atchison, Topeka & Santa Fe Railway Company at no time promised to settle or litigate the claim of the said Edmund

R. Wells against the defendant within the State of Texas; that before and at the time of the filing of said suit by the said Edmund R. Wells in the District Court of El Paso County, Texas, said Railway Company owned and operated and since then has owned and operated and now owns and operates lines of railroads extending through a number of counties in the State of New Mexico, including the County of Socorro in which said Edmund R. Wells claims to have been injured on the 25th day of March, 1921, and including the Counties in which are all of the towns of Las Cruces, Hillsboro, Las Lunas and Albuquerque, and also in the County in which La Junta, Colorado is situated, and in all of which Counties at all times herein mentioned said Railway Company was transacting business and had officers and Agents upon whom service of process could have been had and now can be had, and in each of which said Counties there then was and now is a Court having jurisdiction of the cause of action of said Wells.

Seventh

[fol. 76] That under the laws of the State of Texas no special appearance could be entered by the Railway Company in the cause filed by the said Edmund R. Wells in the District Court of El Paso County, Texas for the purpose of testing the service of citation therein nor for the purpose of questioning the jurisdiction of said Court over defendant, but under the laws of the State of Texas an appearance for any purpose would be and will be held a general appearance for all purposes, and said Railway Company would thereby have subjected itself to the jurisdiction of said Court for all purposes, and it would have been necessary for it to have gone to the expense of bringing its witnesses from New Mexico in order to make proper defense therein or to have taken their depositions; that said Railway Company could not have entered its appearance in the District Court of El Paso County, Texas for the purpose of moving to set aside said judgment by default or for the purpose of testing the amount of damages to which said Edmund R. Wells may be entitled or for any purpose whatever, without subjecting itself to the jurisdiction of the District Court of El Paso County, Texas for all purposes.

Eighth

That the monies belonging to complainant, and impounded under the writ of garnishment served upon the Rio Grande, El Paso & Santa Fe Railway Company, represent the balance due to complainant from said Garnishee as its proportion of the transportation charges due entirely to inter-state traffic conducted wholly without the State of Texas, and the same would have been used by com-[fol. 77] plainant in the conduct of its business as a common carrier in its interstate business and intra-state business in the states thru which it operates; that the cars, engines, and railroad equipment belonging to complainant and in the possession of the Garnishee, as set up in its answer, are lawfully in the possession of the Garnishee under a contract with the complainant, under and by which said

Garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights, all such engines, cars and other railroad equipment having been delivered to Garnishee by complainant as connecting carrier of inter-state freights, and same would have been returned to complainant in due course of business, and were each and all needed by your complainant, when so returned, in the conduct of its business as an inter-state carrier and intra-state carrier.

That for many years it has been and is now the custom and practice of rail carriers to allow their freight charges to follow the shipments, so that the delivering line collects the entire freight charges of all carriers over whose lines the shipments have moved, and the delivering carrier accounts to the other carrier or carriers for its or their proportion of the feight collected.

That for many years its has been and is now the custom, in order to serve the convenience of passengers, for the initial line to sell passenger tickets and coupons good for transportation over connecting lines and to collect from the passenger the entire charge, and to account to the connecting line or lines for its or their proportion thereof.

[fol. 78] That the Garnishee, Rio Grande, El Paso & Santa Fe Railway Company, owns and operates a railroad only 20.22 miles long, extending from El Paso to the New Mexico-Texas State line, where it connects with the railroad of complainant.

That the City of El Paso has a population of more than fifty thousand (50,000) people, and has a very large commerce originating therein and passing through. It is to the advantage of plaintiff, as it has done in the past, to permit its cars and engines to run over the railway of the Garnishee from and to El Paso; and that this is likewise done under a contract as hereinabove referred to; that it is likewise customary and to the advantage of plaintiff to permit Garnishee to collect the freight charges for the proportion thereof accruing to plaintiff on the freight charges over its line destined to El Paso, and to permit the said Garnishee to sell through tickets good for passage over the railroad of plaintiff, and to collect the charges from the passengers, and to account to plaintiff for its proportion thereof; that the monies due plaintiff by Garnishee hereinabove mentioned were monies so collected by Garnishee under such practices for account of plaintiff.

Ninth

That Article 293 of the Revised Statutes of the State of Texas reads as follows:

"Art. 293. (239.) (205.) Judgment Against the Garnishee When He is Indebted.—Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, [fol. 79] or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the

garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs."

That Article 1874 of the Revised Statutes of the State of Texas, reads as follows:

"Art. 1874. (1235) (1235) Citation by Publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, address to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper pub-[fol. 80] lished in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published one in each week for four consecutive weeks previous to the return day thereof. (Acts March 16, 1848, p. 106, Sec. 13; March 15, 1875, p. 170, Sec. 1. Acts 1879, ch. 96, 0.103, P. D. 25.)"

Section 6, Article 10 of the Constitution of Texas is as follows:

"No Railroad company organized under the laws of this State shall consolidate, by private or judicial sale or otherwise, with any railroad Company organized under the laws of any other State or of the United States."

Article 6406 of the Revised Statutes of the State of Texas reads as follows:

"No corporation, except one chartered under the laws of the State of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or operate any railway within this State."

Article 1861 of the Revised Statutes of the State of Texas reads as follows:

"Art. 1861. (1223) Foreign Corporations, How Served.—In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association citation or other process may be served on the president, vice-president, sec-[fol. 81] retary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association, or acting corporation or association. (Acts of 1855, p. 79.)"

Tenth

That because of the rendition of the judgment in the garnishment suit of Edmund R. Wells against the Rio Grande, El Paso & Santa Fe Railway Company, hereinabove referred to, said Garnishee is now withholding and will continue to withhhold sufficient of the funds in its possession belonging to complainant to satisfy the judgment so entered against it, and the defendant herein will attempt to apply to the extinguishment of said judgment sufficient of said funds as will satisfy the demands of defendant, which said demands are evidenced by the judgment entered in favor of Edmund R. Wells against your complainant, as well as the judgment entered in the garnishment suit hereinabove mentioned; that demand has been made by the defendants upon the Garnishee for the payment of said judgment and that the said Edmund R. Wells is insolvent, and there would be no voluntary return of any funds paid to him in satisfaction of said judgment, in the event said judgment should afterwards be set aside.

Eleventh

That for many years prior to the entry of the final decree in the case of your complainant against J. F. Weeks, et al. Numbered 109 In Equity on the docket of this Court, it had been the practice of the attorneys residing in El Paso to institute suit against your com- [fol. 82] plainant in the Courts of El Paso County, for injuries occurring to persons in the state of Illinois, Kansas, Colorado, New Mexico, Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that there had been filed prior to the time plaintiff exhibited its bill in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State Courts of El Paso County, Texas for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases in order to prevent default it was necessary for your complainant to defend in said causes, and it so defended said cases by bringing numerous employees from their regular work in such other States to El Paso to testify, and during the absence of said employee witnesses from their regular work, substitutes were employed at expense to per- from the services of said employees; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State Courts of El Paso County, Texas against complainant until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against your complainant been instituted in any State through which complainant operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought.

Twelfth

[fol. 83] Either party may offer any other, further or additional testimony provided same does not vary or contradict anything herein contained.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Complainant. Lea, McGrady, Thomason & Edwards, Attorneys for Defendant.

Approved this 3d day of May A. D. 1922.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Decree—Filed Mar. 24, 1922

The above numbered and entitled cause being at issue, and all parties defendant having answered to the merits, same was regularly called for trial, and the Court having heard and considered the evidence offered, consisting solely of agreed statement of facts filed herein, as well as the argument of counsel thereon, and said cause having been finally submitted, the Court, after consideration on this the 22nd day of March, A. D. 1922 at and during the October Term of this Court, adjudged and decreed that there was no equity in complainant's bill, the Court being of the opinion that under the [fol. 84] facts appearing and applicable law the Complainant was subject to the jurisdiction of the Courts of Texas in the matter herein complained of and was not entitled to the issuance of a writ of injunction, either temporary or permanent therein.

It is therefore, the order, judgment and decree of this Court that the defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and E. T. Edwards, and each of them, go hence without day herein, and recover their costs in this behalf expended; that the prayer of the complainant, Atchison, Topeka & Santa Fe Railway Company, for an injunction herein be, and the same is hereby, in all things, denied and refused, and that the bill of said complainant filed herein should be dismissed; that all costs in this proceeding be taxed against the said complainant, Atchison, Topeka & Santa Fe Railway Company.

To the action of the Court in refusing the relief prayed for in its bill of complaint, and the refusal of the Court to grant the injunction as therein sought, the complainant in open Court duly excepted to the order, judgment and decree herein entered, and gave notice

of appeal to the Honorable Circuit Court of Appeals for the Fifth Circuit.

It is further ordered that forty-five (45) days from and after the entry of this judgment be allowed in which to prepare and file a statement of facts herein, and to otherwise perfect the appeal taken [fol. 85] and to be taken by the complainant herein, and said complainant shall give an appeal bond in the sum of $8,000.00, payable to defendants and conditioned as required by law.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

Petition for Appeal and Order Allowing Same—Filed May 3, 1922

[Title omitted]

The above named Complainant, the Atchison, Topeka & Santa Fe Railway Company, conceiving itself aggrieved by the decree and order entered on the 24th day of March, A. D. 1922, in the above entitled proceeding, doth hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Fifth Circuit, and it prays that this, its appeal, may be allowed and that a transcript of the record of the proceedings and papers upon which said decree and order was made and entered, duly authenticated, may be sent to the said the United States Circuit Court of Appeals for the Fifth [fol. 86] Circuit, and as in duty bound will ever pray.

Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Attorneys for Complainant and Appellant, the Atchison, Topeka & Santa Fe Railway Company.

And, now on this the 3d day of May, A. D. 1922 it is ordered that the appeal be allowed as prayed for.

W. R. Smith, Judge.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Assignments of Error—Filed May 3, 1922

Comes now, the complainant, Atchison, Topeka & Santa Fe Railway Company, and says that in the record and proceeding in the

above styled cause there is manifest error, which it assigns as such as follows.

[fol. 87]

I

The Court erred in refusing to issue the injunction prayed for, and in holding that under the facts, the Complainant was not entitled to relief sought.

II

It appearing that Complainant is a foreign railroad corporation, has no line of railroad within the State of Texas, does not operate any line of railway within that State, and does not conduct its business as a common carrier for hire within that State, it was not subject to the jurisdiction of the District Court of El Paso County, Texas, in the cause of action therein declared upon in the case of Edmund R. Wells against it, and the enforcement of the default judgment therein obtained is and will be a taking of Complainant's property without due process of law, and a denial to it of the equal protection of the law, as guaranteed under the Fourteenth Amendment to the Constitution of the United States, and as against which Complainant was and is entitled to an injunction herein.

III

The service of process by publication in the case of Edmund R. Wells against the Complainant, as well as service therein of citation on the Secretary and Treasurer of Complainant at Topeka, Kansas, did not confer jurisdiction upon the District Court of El Paso County, Texas to hear and determine the cause declared upon.

IV

The service of the writ of garnishment upon the Rio Grande, El Paso & Santa Fe Railway Company in the case of Edmund R. Wells [fol. 88] against Complainant, as filed in the District Court of El Paso County, Texas, did not give to that Court the right nor confer jurisdiction upon said Court to hear and determine the cause of action so declared upon by Wells against the Complainant, and Complainant was entitled to the issuance of the writ of injunction herein, and the Court erred in refusing to issue the same.

V

It appearing that defendant, a foreign railroad corporation, was sued in a State Court of the State of Texas on a cause of action for unliquidated damages arising beyond the limits of said State, and that defendant had not voluntarily entered its appearance in said cause, there was no jurisdiction in the Court to hear and determine the same, and any Statute of the State of Texas which undertakes to confer such jurisdiction by any process, is, as to Complainant and under the facts herein appearing, void and the enforcement of same

would and will be violative of the Fourteenth Amendment to the Constitution of the United States, in that same would and will be a taking of Complainant's property without due process of the law, and a denial to it of the equal protection of the law, and as against which Complainant was and is entitled to an injunction therein, and the Court erred in refusing to issue the same.

VI

Article 247A of the Revised Statutes of the State of Texas does not confer jurisdiction over foreign railroad corporations, and a service of the writ of garnishment herein on the Rio Grande, El Paso & [fol. 89] Santa Fe Railway Company did not confer jurisdiction upon the Courts in Texas over the defendant, Complainant herein, in the suit filed against it in said State Court by Edmund R. Wells, and the issuance and service of said writ of garnishment fixed no lien on any properties of Complainant which could be made the basis of any character of judgment, and no jurisdiction was thereby conferred upon the District Court of El Paso County over Complainant on the cause of action declared upon, and any Statute of the State of Texas which undertakes to confer such authority and give jurisdiction in causes of action of the nature herein complained of is void and the enforcement of a judgment based thereon, under the facts herein appearing, will and would deprive Complainant of its property without due process of law, and will and would be a denial to it of the equal protection of the law as required under the Fourteenth Amendment to the Constitution of the United States, and the judgment entered in the case of Edmund R. Wells against Complainant being therefore void, Complainant was entitled to the relief sought in its bill herein filed, and the Court erred in refusing the same.

VII

Article 247A of the Revised Statutes of the State of Texas is wholly inapplicable to the facts of the case as declared upon Edmund R. Wells in his cause of action filed against Complainant in the District Court of El Paso County, Texas, and to construe the same as authorizing the issuance and service of the writ of garnishment impound- [fol. 90] ing property belonging to Complainant, and thereby fixing jurisdiction against the Complainant would, and will be, contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and the Transportation Act of 1920, and the Legislature of Texas was and is without power to fix jurisdiction on causes of action against a foreign railroad corporation, under the facts as herein appearing, as well as to fix any lien on or against any funds or property belonging to such foreign railroad corporation, and that may be in the possession of a resident of the State of Texas, and to construe said Article of the Texas Statutes as so authorizing would, is and will be contrary to the provisions of the Interstate Commerce Act of 1906 as amended, and Transportation Act of 1920, and the Court erred in not so holding.

VIII

Article 247A of the Revised Statutes of the State of Texas is void and wholly unenforceible, in that additional rights and remedies are therein given against non-residents of the State of Texas to any that may be asserted against residents of said State, and to apply and enforce same against a foreign railroad corporation is and will be a denial to such corporation of the equal protection of the law, and is and will be a taking of its property without due process of law, and same is and will be violative of Section 2, Article 4 of the Constitution of the United States, which requires that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and no right is or was conferred upon [fol. 91] the said Edmund R. Wells by Article 247A of the Revised Statutes of the State of Texas which can or may be enforced against Complainant, and the Court erred in not so holding.

IX

The issuance and service of the writ of garnishment on the Rio Grande El Paso & Santa Fe Railway Company in the case of Edmund R. Wells against Complainant conferred no jurisdiction upon the District Court of El Paso County, Texas over Complainant or to hear and determine the cause of action declared upon against it by the said Edmund R. Wells, as the service of said writ of garnishment fixed no lien on the funds or property attempted to be impounded under said writ of garnishment, as no valid judgment had been obtained against Complainant by the plaintiff prior to the issuance of said writ of garnishment, and no property of Complainant was legally impounded under said writ of garnishment so served, and because of which there was no jurisdiction and the judgment entered was void, and as against the enforcement of which Complainant is entitled to an injunction.

X

It appearing that the monies impounded under the writ of garnishment served upon the Rio Grande, El Paso & Santa Fe Railway Company in the cause of action asserted by Edmund R. Wells against Complainant accrued to Complainant in the conduct of its Interstate business as a common carrier, conducted wholly beyond the limits of the State of Texas, and that same would be used by it in [fol. 92] carrying on its transportation business wholly beyond the limits of the State of Texas and as required by law and the regulations of the Interstate Commerce Commission, to withhold the same, or any portion thereof, under and by virtue of the writ of garnishment so served, as well as the judgment entered in the garnishment proceeding, will be and is violative of the Amended Act to regulate commerce, approved May 29th, 1917 as well as the Transportation Act of 1920, and particularly Section 402 thereof, and said funds are not subject to said process of garnishment and no lien became

fixed on or against the same by reason of the service of said writ of garnishment, and the entry of judgment thereon, and because of which no jurisdiction was conferred upon the District Court of El Paso County, Texas over complainant in the cause of action asserted against it by Edmund R. Wells, and the Court erred in not so holding.

XI

It appearing that the engines, cars and other railroad equipment impounded under the writ of garnishment served on the Rio Grande, El Paso & Santa Fe Railway Company were in the possession of Garnishee under a contract with Complainant, giving to said Garnishee the right to the use of said engines, cars and equipment in the conduct of transportation business, same having been delivered to Garnishee by Complainant in due course of business as a common carrier, and that same were needed by Garnishee as well as Complainant in the conduct of such transportation, and that such commerce handled therein was almost exclusively Interstate in character, same [fol. 93] was not subject to the process of garnishment and the attempted impounding thereof under said writ of garnishment did not confer jurisdiction upon the District Court of El Paso County, Texas over Complainant in the cause of action asserted against it by Edmund R. Wells, and the Court erred in not so holding.

XII

To construe the Statutes of the State of Texas as to authorize the seizure by attachment of cars and engines of Complainant while in the possession of Garnishee or to authorize the seizure by writ of garnishment monies due or to become due Complainant by Garnishee of freight and passenger charges for account of Complainant, same having been collected by Garnishee as the delivering transportation line, will interfere with, impede and obstruct Complainant in the performance of the duties imposed upon it by the Act to regulate Commerce, and will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and, said Statutes of the State of Texas so construed will deprive Complainant of its properties and rights without due process of law, as it will not be due process of law when requiring Complainant by the Act to regulate Commerce to permit its cars and engines to run into Texas, and to permit the Garnishee to collect its freight and passenger charges, to require Complainant to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other states, originating in such other States, and having [fol. 94] no relation to any traffic or transportation to or from El Paso or to any business or thing therein, and the Court erred in not so holding.

Wherefore, Complainant, Atchison, Topeka & Santa Fe Railway Company prays that the judgment rendered in the District Court of United States for the Western District of Texas, whereby an injunc-

tion was denied to it and all other relief prayed for in its petition was likewise denied, be reversed and any and all other relief given to it which in equity it is entitled.

Gardiner Lathrop, J. W. Terry, Wm. H. Burges, A. H. Culwell, Attorneys for Complainant, Atchison, Topeka & Santa Fe Railway Company.

[File endorsement omitted.]

[fol. 95 & 96] Appeal Bond—Filed May 3, 1922; [for $10,000.00; approved, Smith, J; omitted in printing]

In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

[fol. 97] In the District Court of the United States for the Western District of Texas, El Paso Division

[Title omitted]

Citation With Waiver of Service—Filed May 3, 1922

The United States of America, ss:

The President of the United States to Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards, and their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear before the [fol. 98] United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, within thirty (30) days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office in the District Court of the United States, for the Western District of Texas, El Paso Division, in a cause and proceeding wherein the Atchison, Topeka & Santa Fe Railway Company is complainant, and Edward R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards, are defendants, to show cause, if any there be, why the decree and order rendered in favor of said defendants and against the Atchison, Topeka & Santa Fe Railway Company, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, and the seal of said District Court, this the 3d day of May, in the year of our Lord, One thousand nine hundred and twenty-two.

Signed this the 3d day of May, One thousand nine hundred and twenty-two.

W. R. Smith, Judge. Attest: D. H. Hart, Clerk of the United States District Court for the Western District of Texas, By Nan B. Smith. (Seal.)

[fol. 99] The order for appeal having been allowed in the above numbered and entitled cause, and said appeal having been duly perfected, service of citation is hereby accepted and waived, and we here and now enter our appearance as though duly served with copies of citation on appeal.

This 3rd day of May, A. D. 1922.

Lea, McGrady, Thompson & Edwards, J. G. McGrady, Solicitors for Defendants, Edmund R. Wells, Claude B. Hudspeth, George E. Wallace, A. J. Harper, Tom, Lea, J. G. McGrady, R. E. Thomason and Eugene T. Edwards.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT—Filed May 3, 1922

May 2nd, 1922.

To the Clerk of the District Court for the Western District of Texas, El Paso Division:

Please make up record for appeal in this case, as follows:
Caption.
Bill of injunction.
Answer of defendants.
Agreement for submission.
Statement of the evidence.
Decree.
Petition for appeal and order allowing same.
[fol. 100] Assignments of error.
Appeal bond.
Citation with waiver of service.
Certificate.

Turney, Burges, Culwell, Holliday & Pollard, Attorneys for Complainant.

[File endorsement omitted.]

CLERK'S CERTIFICATE

I, D. H. Hart, Clerk of the United States District Court in and for the Western District of Texas, hereby certify that the foregoing

on 100 pages, is a true and correct transcript of proceedings had and orders entered in cause No. 129 in equity, styled: The Atchison, Topeka & Santa Fe Railway Company, Complainants, vs. Edmund R. Wells, et al., as the same appear on file and of record in this office and includes the original citation on appeal at page 97, beside copy thereof.

I do further certify that the foregoing record embraces all pleadings, process and orders had in this case including the praecipe filed by the appellant herein.

Witness my official signature and the seal of said District Court, at office in the City of El Paso, Texas, this the 25th day of May, A. D. 1922.

D. H. Hart, Clerk, By Nan B. Smith, Deputy Clerk. (Seal.)

[fol. 101] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 8th, 1922

[Title omitted]

On this day this cause was called, and, after argument by A. H. Culwell, Esq., for Appellant, and J. G. McGrady, Esq., for Appellees, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

OPINION OF THE COURT—Filed December 15th, 1922

Appeal from the District Court of the United States for the Western District of Texas

A. H. Culwell (J. W. Terry, William H. Burges and Gardiner Lathrop on the brief), for Appellant.

J. G. McGrady (Wallace & Cameron and Lea, McGrady, Thomason & Edwards on the brief), for Appellee.

Before Walker, Bryan, and King, Circuit Judges.

[fol. 102] BRYAN, *Circuit Judge:*

Edmund R. Wells, a citizen of Colorado, sustained personal injuries in New Mexico, while he was employed by the Atchison, To-

peka & Santa Fe Railway Company, a corporation under the laws of Kansas. Wells brought suit in a State Court of Texas against the railway company, alleging that his injuries were due to its negligence. In Texas the railway company was engaged only in interstate commerce, and was not served with process. In aid of his suit, Wells obtained, first, a writ of attachment, and then a writ of garnishment; and recovered judgment by default, in the sum of $4,000, and thereafter a judgment in the same amount against the garnishee, the Rio Grande, El Paso & Santa Fe Railroad Company.

The present suit is brought by the Atchison, Topeka & Santa Fe Railway Co., Appellant, and original Defendant in the garnishment proceedings, to enjoin Wells and his attorneys, who are the Appellees here, from enforcing the collection of the judgments obtained by Wells.

The Court denied the relief prayed in this suit, and dismissed the bill of complaint.

The issuance of writs of attachment, before judgment, against persons, partnerships, associations or corporations, upon which personal service cannot be obtained, is authorized by statute, even in suits founded in tort or upon demands which are unliquidated. Vernon's Sayle's Tex. Civil Statutes, (1914), Art. 247-a. Writs of garnishment may be issued after an original writ of attachment has been issued. Id. Art. 271.

Appellant contends that the judgment which it seeks to enjoin was in personam; that if that suit was in rem, the judgment against the garnishee is void because the Court was without jurisdiction to enter it until after a valid judgment in personam had been recovered against appellant; and that the statutory provisions of Texas above referred to are void as an interference with interstate commerce.

[fol. 103] The judgment which Wells obtained against the Appellant railway company was not in personam. It does not purport to be, but by its own terms can only be satisfied out of funds impounded by the writ of garnishment. The rule laid down in Pennoyer vs. Neff, 95 U. S. 714, a case so much relied on by Appellant, to the effect that a personal judgment obtained against a non-resident, upon whom no personal service of process was made, is without validity, is clearly recognized by the Courts of Texas. Stewart vs. Anderson, 70 Tex. 588; Studebaker vs. Gorlach, 192 S. W. 545.

It is also established that a judgment in rem only confers jurisdiction to satisfy a plaintiff's demand out of property impounded within the jurisdiction of the Court. Mann vs. Brown, 201 S. W. 438. As already seen, attachment before judgment is authorized by statute in Texas in a suit founded upon tort, and a writ of garnishment may issue at any time after the issuance of a writ of attachment. Under the terms of the statutory provisions, therefore, a writ of garnishment may issue before judgment is obtained. We are of opinion that the State Court acquired jurisdiction to proceed in rem, and to subject the garnisheed funds to the payment of the judgment obtained by Wells against Appellant. Harris vs. Balk, 198 U. S. 215.

The suit brought by Wells was maintainable in a State Court of Texas, although both the Plaintiff and the Defendant were citizens of other States. Atchison, Topeka & Santa Fe Railway Co. vs. Sowers, 213 U. S. 55; Tenn. Coal, etc., Co. vs. George, 233 U. S. 354. The effect upon interstate commerce of garnishment and attachment proceedings, authorized by a State Statute, is too remote to be objectionable. Davis vs. Railway Co., 217 U. S. 157; International Harvester Co. vs. Kentucky, 234 U. S. 579.

The decree is affirmed.

[fol. 104] IN THE U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT

Extract from the Minutes of December 15th, 1922

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the Appellant The Atchison, Topeka & Santa Fe Railway Company and the sureties on the appeal bond herein, E. W. Kayser, and F. M. Murchison, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 105] UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 101 to 104 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3886, wherein The Atchison, Topeka & Santa Fe Railway Company, is Appellant, and Edmund R. Wells, et al., are Appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 100 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 24th day of January, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 106] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 3886

[Title omitted]

WRIT OF CERTIORARI AND RETURN—Filed July 19, 1923

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 16th day of July, A. D. 1923, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. 877

[Title omitted]

Come now, the parties by their respective Counsel, and hereby stipulate and agree that the record already on file in the office of the Clerk of the Supreme Court of the United States shall stand as a return to the Certiorari herein granted by the Supreme Court of the [fol. 107] United States, and the Writ thereon issued, directed to the Honorable the Judges of the United States Circuit Court of Ap-

peals for the Fifth Circuit, same dated the 23rd day of June, A. D. 1923.

(Signed) A. H. Culwell, (Signed) Wm. H. Burges, (Signed) J. W. Terry, Attorneys for the Atchison, Topeka & Santa Fe Railway Company. (Signed) J. G. McGrady, (Signed) Geo. E. Wallace, Attorneys for Edmund R. Wells, Tom Lea, R. E. Thomason, J. G. McGrady, Claude B. Hudspeth, Geo. E. Wallace, A. J. Harper, and E. T. Edwards."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 16th day of July, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 108] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Atchison, Topeka & Santa Fe Railway Company is appellant, and Edmund R. Wells et al. are appellees, No. 3886, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-[fol. 109] preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 110] [File endorsement omitted.]

[fol. 111] [File endorsement omitted.]

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IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

vs.

EDMUND R. WELLS, et als. *Respondents.*

No.....

Please take notice that on or about the 1st day of March, A. D. 1923, The Atchison, Topeka & Santa Fe Railway Company, as Petitioner, will file with the Clerk of the Supreme Court of the United States a certified copy of the transcript of record herein, and the requisite number of printed copies thereof, together with its petition for Writ of Certiorari, a copy of which with the Brief in support thereof is hereto attached, and Petitioner will move the motion hereto annexed before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, on Monday, the 19th day of March A. D. 1923, at the opening of the Court on that date, or as soon thereafter as counsel can be heard, and that it will then and there move for such further relief in the premises as may be just.

Dated at El Paso, Texas, on this the 19th day of February, A. D., 1923.

Alex. Britton,
J. W. Terry,
A. H. Culwell,
Attorneys for Petitioner.

TO J. G.McGRADY and GEO. E. WALLACE.
Attorneys for Respondents,

EDMUND R. WELLS.
GEO. E. WALLACE
A. J. HARPER
C. B. HUDSPETH
TOM LEA
J. G. McGRADY
R. E. THOMASON
E. T. EDWARDS

ACKNOWLEDGEMENT OF SERVICE

Due service and receipt of three (3) copies of the foregoing notice of motion, and attached copy of motion and application for Writ of Certiorari, and brief in support thereof, is hereby admitted, this the 19th day of February, A. D. 1923.

Geo. E. Wallace.
J. G. McGrady,
Attorneys for Respondents.
Edmund R. Wells.
Geo. E. Wallace,
A. J. Harper,
C. B. Hudspeth.
J. G. McGrady,
Tom Lea.
R. E. Thomason.
E. T. Edwards.

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *Petitioner*
vs.
EDMUND R. WELLS, et als,
Respondents.

No.....

MOTION

Comes Now, The Atchison, Topeka & Santa Fe Railway Company by Alex. Britton, J. W. Terry and A. H. Culwell, its attorneys and counsel, and moves the Court upon a certified copy of the record herein, and upon the annexed petition for Writ of Certiorari directed to the United States Circuit Court of Appeals, Fifth Judicial Circuit, sitting at New Orleans, Louisiana, to bring before this Honorable Court the case of The Atchison, Topeka & Santa Fe Railway Company, Appellant, vs. Edmund R. Wells, et als, Appellees, recently decided by the United States Circuit Court of Appeals, Fifth Judicial Circuit, for such proceedings therein as this Honorable Court may deem just, and for such other and further relief in the premises as may be just.

Alex Britton,
J. W. Terry,
A. H. Culwell,
Attorneys for Appellant and Petitioner.

Gardiner Lathrop,
of Counsel.

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *Petitioner,*
vs.
EDMUND R. WELLS, et als, *Respondents.*

No.....

PETITION FOR CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Atchison, Topeka & Santa Fe Railway Company, respectfully petitions the Court to grant it a Writ of Certiorari to the Honorable United States Circuit Court of Appeals, Fifth Judicial Circuit, sitting at New Orleans, Louisiana, to review the decree of said Court, affirming the decree in favor of Respondents entered in the District Court of the United States for the Western District of Texas, El Paso Division, sitting at El Paso, in the suit of The Atchison, Topeka & Santa Fe Railway Company vs. Edmund R. Wells, et als, and to remove the record in said cause to this Court for the purpose of such review, a copy of said record being presented herewith. The decree herein complained of having been entered in said the United States Circuit Court of Appeals, Fifth Judicial Circuit, on the 15th day of December, A. D. 1922.

Your petitioner respectfully represents that important Federal questions and Federal rights in favor of it, dependent upon the correct construction and proper application of the provisions of the Act of Congress known as the Interstate Commerce Act of 1906, as amended. the Transportation Act of 1920, as well as the Fourteenth Amendment to the Constitution of the United States. are involved, particularly as to the rights of a State Court to subject Petitioner, a foreign corporation. and its property to the jurisdiction thereof, and the correct determination of these questions is of great importance to the public and necessary to an orderly and uniform interpretation of said Acts of Congress. That Petitioner has been denied rights, title, privileges and immunities secured to it under the Fourteenth Amendment to the Constitution of the United States, and liabilities have been imposed upon it contrary to the provisions of the Interstate Commerce Act of 1906. as amended. and the Transportation Act of 1920. the liabilities so imposed being a burden upon Interstate Commerce violative of the provisions of said Acts of Congress and by reason of the erroneous rulings of the said United States Circuit Court of Appeals, Fifth Judicial Circuit, a relief has been denied to it to which it was entitled, the said rulings of the said United States Circuit Court of Appeals. Fifth Judicial Circuit. among others, being as follows:

I.

The United States Circuit Court of Appeals, Fifth Judicial Circuit, held that a foreign railroad company, having no line of railway within the State of Texas, no Agent therein, conducting no business therein, could be subjected to the jurisdiction of a State Court thereof, in an action for damages for personal injuries on a cause of action occurring without the State, by a plaintiff who re-

sides without the State, said jurisdiction alleged to arise from the impounding, under garnishment, of railroad rolling stock belonging to said Company, and found lawfully in the possession of a connecting carrier located within the local jurisdiction, as well as funds belonging to said foreign railway company arising from the conduct of its interstate transportation business, conducted wholly without said State, both rolling stock and funds so impounded used in the conduct of said business as required by law.

II.

Said Circuit Court of Appeals held that under facts as above appearing, plaintiff in said cause could, by garnishment, so impound property belonging to a foreign railroad company and used in the conduct of its interstate transportation business wholly without the State of Texas, as to warrant a judgment in rem against it, even though said railway company was solvent and had property subject to execution in the State where the accident occurred, as well as in each of the other States in which it does business of many thousand times greater value than any sum that might be found due to the plaintiff on the cause of action asserted.

III.

The Circuit Court of Appeals held, in effect, that a Statute of Texas authorizing attachment on unliquidated demands, applicable only against non-residents, warrants process of garnishment, and that the impounding thereunder of funds and rolling stock of a foreign railroad corporation in an action for personal injuries in behalf of a non-resident occurring in another State (said funds arising from business conducted wholly beyond the limits of said State and rolling stock used exclusively in interstate com-

merce) was valid, and as against which said railway company could not invoke either the Fourteenth Amendment to the Constitution of the United States, Section Two, Article Four of said Constitution, or the Interstate Commerce Act as amended, or the Transportation Act of 1920.

IV.

The Circuit Court of Appeals held that impounding funds due to a foreign solvent railway company as balances for transportation charges arising from business conducted wholly beyond the limits of the State on unliquidated demand in favor of a non-resident did not interfere with Interstate Commerce as regulated by the Interstate Commerce Act and Transportation Act of 1920.

V.

The Circuit Court of Appeals held, in effect, that the process of foreign attachment could be constitutionally used for the sole purpose of acquiring jurisdiction over a non-resident in behalf of a non-resident, on an unliquidated demand arising outside the State, it appearing definitely that the defendant had ample assets, subject to any process, at the place where the cause of action arose, as well as in the State where the plaintiff resided, and in each of the States where it does business. The contention of defendant, in these circumstances, that the use of such process was the taking of its property without due process of law and was a denial to it of the equal protection of the law, was overruled.

VI.

Petitioner contended that to construe the Statutes of Texas as authorizing the seizure by attachment of cars and engines belonging to it, while lawfully and under contract in the possession of a connecting line, or as authorizing the

seizure by garnishment of monies due or to become due to it by a connecting line for freight and passenger charges for account of Petitioner, same having been collected by Garnishee as the delivering transportation line, would interfere with, impede and obstruct Petitioner in the performance of the duties imposed upon it by the Act to regulate commerce, and would interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and that said Statutes of Texas, so construed, would deprive Petitioner of its properties and rights without due process of law, because it would not be due process of law when requiring Petitioner by the Act to regulate commerce to permit its cars and engines to run into Texas and to permit the Garnishee to collect its freights and passenger charges to further require Petitioner to submit to the jurisdiction of the Courts of Texas on causes of action by citizens of other States, originating in such other States, and having no relation to any traffic or transportation to or from a point in Texas, or to any business or thing therein. Each and all of these contentions were, by the Circuit Court of Appeals, overruled.

SUMMARY OF THE FACTS

The cause was submitted on an agreed Statement of Facts, from which it appears that Wells filed suit in the State Court at El Paso, Texas, October 7th, 1921, against Railway Company for damages for personal injuries sustained on the 25th day of March, 1921. Notice was served on an officer of Railway Company at Topeka, Kansas, and service made by publication in newspaper in the manner provided by the Texas Statutes; writ of attachment was issued in the method prescribed by the Texas Statutes,

particularly Article 247-A, which writ was returned by the sheriff of El Paso County with the statement that no property of the defendant was found in the county. Thereupon one of the attorneys for plaintiff made an affidavit for garnishment which was served on the Rio Grande, El Paso and Santa Fe Railway Company, which company as garnishee filed an answer which is of record at pages 46-58; at all times Railway Company was a corporation of the State of Kansas, having no line of railroad and no agents and not doing business in the State of Texas. Wells' cause of action arose in the State of New Mexico where he was then employed by Railway Company, at which time Wells was a resident of the State of Colorado; that in said states at all times involved there were courts having jurisdiction of Wells' cause of action in each of which states Railway Company had property subject to execution of a value many thousand times greater than any liability that might be found in favor of Wells; that Railway Company made no appearance in the State Court, wherein a judgment by default was entered against Railway Company on December 21, 1921, for $4.000.00. That the attorneys for Wells who are respondents herein have been assigned an interest in such judgment; that on January 24, 1922, Judgment was entered for Wells against the garnishee and the principal judgment against Railway Company undertook to limit the effect thereof to funds and property of Railway Company held by the garnishee; that to have defended this suit at El Paso, Railway Company would have been required to bring its witnesses from the State of New Mexico, a distance of 150 miles, at a large expense and to be deprived of their services during the time required; that under the statutes of Texas no appearance could have been made in the State court for the purpose of contesting the jurisdiction without thereby submitting to jurisdiction on the merits;

that the moneys impounded and held by garnishee are a balance due Railway Company as its proportion of the transportation charges from interstate traffic conducted by it wholly without the State of Texas which but for being so impounded would have been used by Railway Company in the conduct of its business as a common carrier in interstate and intrastate traffic in the states in which it operates. That the engines and cars of Railway Company in possession of garnishee were delivered by Railway Company to garnishee as a connecting carrier of interstate freights and would have been returned to Railway Company in due course of business and were all needed when returned in the conduct of its business as an interstate carrier and while same were in possession of garnishee, garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights. For many years it has been the custom of rail carriers to allow the freight charges to follow the shipments, the delivering line collecting the charges for all carriers and accounting to each other carrier for its proportion; likewise it has been the custom for the initial line to sell through passenger tickets, collecting the entire charge and accounting to the connecting lines for their proportions; that a different method could not be pursued with reference to interstate business handled in and out of El Paso by garnishee's railroad and the railroad of Railway Company which connect at the New Mexico-Texas state line, without discriminating against the city of El Paso (population 50,000 or more) and against such traffic. Pending litigation the garnishee is withholding sufficient of the funds due Railway Company to satisfy the purported judgment in favor of Wells. For many years prior to the decision in A. T. & S. F., v. Weeks, 254 Federal 513 (Petition for Certiorari refused by this Court), which held that Railway Company was not subject to suit in Texas, it had

been the practice of attorneys at El Paso to there institute suits against Railway Company for injuries to persons in the states of Illinois, Colorado, New Mexico, Arizona, Missouri and California, when plaintiffs were non-residents of the State of Texas; that there had been filed during the six years preceding the filing of the bill in the Weeks case 75 suits at El Paso for personal injuries occurring in such other states in which many thousands of dollars were involved and in which in order to prevent defaults it was necessary for Railway Company in defending to bring numerous employes from their regular work in such other states to El Paso to testify and during the absence of such employes as witnessess substitutes were employed.

We append as an exhibit extract from the Constitution of Texas and copies of certain of its Statutes.

SUMMARY OF THE LAW

(a). If the Texas Statute, Article 247a, is construed to warrant garnishment under facts here appearing, it interferes with and impedes Interstate Commerce as directed and required under the Interstate Commerce Act and Transportation Act of 1920.

(b). To subject petitioner's property on the cause and under the facts here appearing would be a taking of same without due process of law, and a denial to it of the equal protection of the law.

(c) Any Statute of Texas which undertakes to confer jurisdiction over foreign railroad corporations, or to fix liens on property thereof, under facts as here appear, is violative of the Fourteenth Amendment to the Constitution of the United States.

(d). Article 247a of the Texas Statutes is unenforceable as here applied, in that additional rights and remedies are therein given against non-residents to any that may be asserted against residents of the State, and to apply same to a foreign railroad corporation would violate the Fourteenth Amendment, and would be violative of Section 2, Article IV, of the Constitution, which requires that citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several states.

(e). The process of foreign attachment cannot be constitutionally used to confer jurisdiction, the defendant being solvent and having assets subject to process at the place where the cause of action arose, at the place where the defendant resides, and in other states.

(f). The funds impounded were not, under the facts appearing, subject to garnishment and no lien thereon was fixed under the garnishment writ.

(g). Article 247a of the Texas Statutes does not authorize the issuance of the writ of garnishment.

(h). As petitioner is required under the Interstate Commerce Act to permit its cars and engines to run into Texas, it would not be due process of law to require it to submit to the jurisdiction of the Texas State Courts by proceedings in rem on causes of action by citizens of other States, originating in such other States, and having no relation to any traffic or transportation to or from Texas points, or any business or thing therein.

CONCLUSION.

Your petitioner respectfully submits that this is a case in which this Honorable Court should order the issuance

of the Writ of Certiorari because of the manifest errors therein appearing, and the furtherance of justice requires conclusive decision upon the questions of law involved. Your petitioner therefore

PRAYS

this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to bring this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

Alex. Britton,

J. W. Terry,

A. H. Culwell,
Attorneys for Petitioner.

Gardiner Lathrop.
of Counsel.

EXHIBIT.

Section 6, Article 10 Texas Constitution:

"No railroad company organized under the laws of this State shall consolidate, by private or judicial sale or otherwise, with any railroad company organized under the laws of any other State or of the United States." (P. R. 80).

Article 6406 of Texas Revised Statutes:

"No corporation, except one chartered under the laws of the State of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or operate any railway within this State." (P. R. 80).

"Art. 1874. (1235) (1235). Citation by publication—

"Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the Clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once a week for four consecutive weeks previous to the return day thereof. (Acts March 16, 1848, P. 106, Sec. 13; March 15, 1875, p. 170, Sec. 1. Act 1879, Ch. 96, O. 13, P. D. 25)." (P. R. 79).

"Art. 1941. (1346) (1212, 1345). Procedure in case of service by publication where no answer, etc:

"Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and

signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit." (P. R. 71).

"Art. 1861. (1223) Foreign corporation, how served:

"In any suit against a foreign, private or public corporation, joint stock company or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association. (Acts of 1885, p. 79)." (P. R. 80).

Article 293, Texas Revised Statutes:

"Art. 293. (239) (205). Judgment against the Garnishee when he is indebted:

"Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs." (P. R. 78).

Act of 1913.

ATTACHMENTS—Amending Chapter 1, Title 11, Revised Civil Statutes. 1911, Relating thereto.

"An Act to amend Chapter One, title Eleven of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247a. providing for the issuance of attachments in suits against persons. co-partnerships. associations or corporations upon whom personal service cannot be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Chapter One of Title Eleven of the Revised Civil Statutes of this State, adopted in the year A. D. 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247a as follows:

"Art. 247a. Provided that nothing in this Chapter shall prevent the issuance of attachments in suits against persons, co-partnerships. associations, or corporations upon whom peronal service can not be obtained within this State. founded in tort or upon demands which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attachment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage and it is so enacted." (P. R. 7-8)

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

versus

EDMUND R. WELLS, et als, *Respondents.*

No.....

BRIEF.

The Circuit Court of Appeals was inaccurate in its statement to the effect "in Texas the Railway Company was engaged only in interstate commerce." Admittedly, as a fact, it was not engaged in any character of business in Texas, nor, as a matter of law, was it so engaged. The Circuit Court of Appeals, in the case of The Atchison, Topeka & Santa Fe Railway Company vs. Weeks, 254 Fed. 513, so held and a petition for Certiorari in that case was, by this Court, denied. 249 U. S. 602.

The only question at issue here is whether or not petitioner can be subjected to the jurisdiction of Texas Courts on causes of action arising elsewhere at the instance of non-residents, by the impounding under attachment and garnishment of funds or property belonging to it, and arising from or used in the handling of an interstate transportation business.

It has not been contended by Respondents that unaided by these extraordinary writs jurisdiction over Petitioner can be secured in the Courts of Texas. The effect of the service of extraordinary process, under facts admitted, is thus the question at issue, and this question will be discussed therefore from the many angles at which it seems to be presented.

There is at the beginning involved the contention that to enforce the judgments entered, and here complained of, will be, in view of all the circumstances, contrary both to the Interstate Commerce Act and the Transportation Act of 1920. Forbearance is asked while we quote from these Acts.

The Amended Act to Regulate Commerce, 40 Stat.—L. 101, provides:

> "The term 'car service' as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.
>
> "It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful.
>
> "The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the act or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that

the said rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

"The commission shall, after hearing, on a complaint or upon its own initiative, without complaint, establish reasonable rules, regulations and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for non-observance of such rules."

The Transportation Act of 1920, Sec. 402, 41 Stat.—L. 476, provides:

"(10). The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

"(11). It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

"(12). It shall also be the sole duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among

the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines, it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

"(13). The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of this Act relating thereto.

"(14). The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using

it, and the penalties or other sanctions for non-observance of such rules, regulations or practices.

"(15). Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles during such emergency as in its opinion will best promote the service in the interest of the public, and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearings find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;

and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such times and for such periods as it may determine, and to modify, change suspend or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

"(16). Whenever the Commission is of the opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may upon the same procedure as provided in paragraph (15) make such just and reasonable directions with respect to the handling, routing and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

An analysis of the Act to regulate Commerce as amended (Paragraph 4, Section 1) makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable divisions of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6,

Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service without regard to ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality to any particular description of traffic to any unreasonable prejudice or disadvantage whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the

receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

It appears from the facts that for many years, it has been and is now the custom and practice of carriers to allow their freight charges to follow the shipment, so that the delivering line collects the entire freight charge for all carriers over whose line the shipment is moved, the delivering carrier accounting to the other lines for their proportion of freight collected; that it has been and is customary, in order to serve the convenience of the passengers, for the initial line to sell passengers tickets good for transportation over connecting lines and to collect from passengers the entire charge and account to the other lines for their proportion thereof; that there is a very large commerce originating at, destined to and passing through El Paso; that the cars and engines and other railroad equipment belonging to Petitioner and in the possession of Garnishee were so in its possession under a contract between petitioner and Garnishee, under which Garnishee was entitled to the exclusive use and possession thereof while needed on its line of road, and that same would have been needed and used by petitioner in the conduct of its business as an Interstate carrier when returned by Garnishee to it; that the monies impounded under the writ of garnishment are for services, not only rendered

entirely beyond the limits of the State of Texas, but same are needed and would have been used by petitioner in the conduct of its business as a common carrier, and as required by law.

In other words, it definitely appears that the cars, engines and railroad equipment, as well as monies impounded under the writ of garnishment, were each and all instrumentalities necessary for the use of petitioner in the conduct of its business. Can these instrumentalities be interfered with or interrupted by reason of a local Statute? That such has been the effect in this case may not be denied.

For years it has been the custom for interstate carriers to permit the charges to follow the shipments, the delivering line collecting the entire amount and accounting to other lines; likewise it has been the custom to permit the initial line to sell through tickets and account to the other lines. Plainly, under the provision of the Interstate Commerce Act the petitioner cannot except El Paso from this custom without violating the provisions of such Act, for it would subject El Paso to undue prejudice and disadvantage. Plainly, the acts regulating commerce contemplate free interchange of cars and of engines between connecting lines of railroad and the use by one of the cars and engines of the other, it evidently being the view of Congress that such will promote the handling of interstate traffic. It was evidently also the view of Congress that the practice of the charges following the freight and the sale of through tickets should continue, as carriers are required to establish through routes and such practices are reasonably necessary to the operation thereof. Under such circumstances, is it due process of law for a state to provide for the attachment of such equipment or the garnishment of funds so arising, in cases on foreign causes of action in which the

citizens of the particular state are in no way interested? Can the state impose such a penalty on the carrier for complying with the acts and view of Congress? Aside from the question of due process of law, is not such action or attempted action by a state an interference with and an impediment to interstate commerce? The necessary tendency of such attempted action is to deter carriers engaged in interstate commerce from carrying out the policy of Congress with respect to through routes and through traffic and the interchange of engines and cars.

It has often been decided that the right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, cease as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive powers. We contend that by reason of the amendment to the Interstate Commerce Act, as well as the Transportation Act of 1920, this exclusive power as to the subjects of this litigation has been manifested, and that thereby the same has been removed from the sphere of State action, and that therefore the State has not the power to interfere with or impede the continuity of interstate transportation, and that such has been the effect of the uses to which local Statute has been applied in the instant case cannot be doubted.

We shall not quote, extensively, authorities in support of the proposition above asserted, but refer to Southern Railroad Co. v. Railroad Commission, 236 U. S. 447, holding that local Statute requiring railroads to place grab irons on cars is superseded by the Federal Safety Appliance Act. Erie Railroad v. New York, 233 U. S. 681, holding that the labor law of New York relating to hours of service of telegraph operators void as conflicting with Federal Hours of Service Act. Mo. Pac. Railroad v. Washington, 222 U. S. 370, holding hours of service act ineffective because in

conflict with the Federal Act. McDermott v. Wisconsin, 228 U. S. 132, holding the Wisconsin act relating to labeling syrups void as conflicting with Federal Food & Drug Act. Adams Express Co. v. Croninger, 226 U. S. 506, holding the Carmack Amendment supersedes State regulations on the same subject. Mondou v. Railroad Company, 223 U. S. 55, holding the Federal Employers' Liability Act exclusive Louisville & Nashville R. R. v. Hughes, 231 Federal 739, holding Ohio Act for extension of equipment of locomotive boilers superseded by Federal Act.

So that there being no doubt as to the general rule, let's see the application. In the Interstate Commerce Act, prior to the recent amendment, nothing was undertaken in behalf of the Federal Government relative to cars or car service, except to include them under the general definition of transportation in the first Section, but under the Amendment of 1917, it is provided:

> "The term car service as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation by any carrier, subject to the provisions of this Act."

Just rules and regulations are provided for. Penalties prescribed for violation.

The same subject was treated in the Transportation Act of 1920. Definitions of the Interstate Commerce Act were retained, and car service defined as including the use and return of locomotives, cars and other vehicles, plainly indicating that the return of empty cars is a part of car service over which Congress gave the Interstate Commerce Commission the widest jurisdiction.

It also gave jurisdiction for the use of terminal facilities, etc., and because of the assumption by Congress of the

controls enumerated, State power thereover ceased, and herein lies the distinction as to the rights of petitioner and those considered by this Court in Davis v. C. C. C. & St. L. Railroad Co., 217 U. S. 157, so much relied upon by respondents.

We have undertaken to point out the differences in the state of the law at the time the Davis case was decided (1910) and at the present time. Mr. Justice McKenna necessarily considered the subject, having in mind the Interstate Commerce Act as it then stood. The inference is quite strong, however, as he several times referred in the opinion to Congress and its power in the premises, that it was not the intention to hold that if Congress had assumed control of the entire field of interstate transportation that the Iowa Statute there under discussion would be effective and no contention could have been made in that case by the Railroad Company that the laws of the State interfered with interstate commerce, or that they were directly contrary to the Acts of Congress. It is further said in the opinion that Congress had not intended, by the Interstate Commerce Act, to abrogate the attachment laws of the States, and possibly in the state of the law as it existed at that time, there was no inference that the laws of a State regulating commerce interrupted or violated any provision of a Federal Act. But, this cannot be true now.

A reading of the Interstate Commerce Act, as well as the Transportaiton Act of 1920, must lead to the conclusion that Congress has assumed control of the entire field of interstate commerce, including each and all of the instrumentalities thereof; otherwise, a carrier could not comply with these acts. If, in the face of the requirements thereof, the means of complying therewith may be regulated, impeded or interrupted by the local laws of each State, then the carriers will indeed be in a helpless condition, subjected upon the

one hand to a penalty for their failure to conduct transportation as required by Congress, and to be practically enjoined from so doing by the police regulations of every State.

The highest obligation of the carrier is to the public. This is the keynote of the Acts of Congress, and we are not at all sure but what by reason of these acts the instrumentalities needed in the conduct of that business have not been put away in a kind of a civil sanctuary.

The requirements of the Federal Act are imperative. Service is required. Exchange of equipment is required. The rates prescribed by the Interstate Commerce Commission have for their purpose primarily the gathering of funds sufficient to enable the carriers to perform the service required, and if, by garnishment process in a foreign jurisdiction on a cause of action arising elsewhere, these funds may be diverted under a local Statute, the continuity of service is to that extent always interrupted.

It must be noted that Mr. Justice McKenna in the Davis case was careful to limit the effect of the decision to the facts there appearing, and necessarily to the law as it then existed. There has been great advance in the solution of the various railroad problems that have been troublous during the past few years. The demands of the public for uninterrupted and prompt service; yes, the growing demands therefor was the moving spirit behind the Amendments to the Act of Congress regulating carriers. The twelve years intervening since the pronouncement of Mr. Justice McKenna, as above, have been wrought with changes more rapid and drastic in the control of the transportation of this country than ever before, or that our forefathers ever dreamed would be taken, and as a result of which every activity of an interstate carrier is under control of some law or the regulation of the Interstate Commerce Commission.

It would seem that no phase of the subject has been left untouched, and as Congress stepped in, and by each successive step assumed greater control, the power of the States receded relatively.

There is no longer, insofar as this subject goes, such a thing as dual control. Congress in effect having said to the carriers:

> "The Federal Government will hereafter regulate all of your activities from the moment a pound of freight to be transported interstate is received, until the car containing the same has been returned to its home terminal. Your power to borrow money for the conduct of your business will be controlled. The issuance of your securities shall be regulated. The wages of your employes will be fixed."

Indeed, this control is so complete that even the right to build new or additional lines is regulated. And, having so entirely surrounded the carrier, even to say that a State may by local Statute seize any of these instrumentalities on a cause of action sounding in tort in a State wherein a particular carrier is not doing business, is inconceivable; and a local law which so authorizes would appear to be so plainly violative of the control of the carrier, and its activities, as evidenced by the Acts of Congress, that no argument should be deemed necessary. And, yet, such is not only the theory but the effect of what is sought in the action instituted by Wells.

It would seem to be plain, in view of what Congress has said, that the State is deprived of the right to interfere with the handling or distribution of cars, or to issue any process which would impede regular and orderly interstate transportation or deprive the carrier of funds necessary for that purpose, and not only so, but it is the policy of the

law to keep lines of transportation open and to require continuous transit between the connecting carriers, as well as interchange of cars, in the interest of the general public, and these needs may not be interfered with by the State; and that this has been the uniform tendency for many years, we have only to cite St. L. & S. W. Railroad v. Arkansas, 217 U. S. 136, wherein a State Statute, which undertook to compel a Railroad Company to distribute cars in a particular manner and as per an order issued by the Railroad Commission of the State, was held to impose a burden on interstate commerce, and was unconstitutional under the commerce clause of the Constitution.

It thus appears that the entire field of interstate transportation has been fully occupied by Congress, and that its regulations are, as to the carrier, so complete and conclusive as to exclude from all consideration State control or interference therewith, and because of which any construction of the Texas Statute so as to authorize thereunder the seizure by attachment of cars and engines of Petitioner while in the possession of the Garnishee or as authorizing the seizure by a writ of garnishment monies due or to become due Petitioner by Garnishee for freight and passenger charges for account of Petitioner, same having been collected by Garnishee as the delivering transportation line, will necessarily impede and obstruct this Petitioner in the performance of the duties imposed upon it under the Act to regulate commerce, and not only so, but that same will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and enjoined upon the carrier.

Not only are the acts regulating commerce materially different from what they were when Davis v. C. C. C. & St. L. R. R. Co., 217 U. S. 157 was decided, but it was not made

to appear there, as it does here, that the result of sustaining the garnishment proceedings would be to cause a flood of foreign litigation, hereinafter discussed, to the detriment of the carriers engaged in interstate commerce, and of such commerce; on the contrary, the Davis case was an isolated case, and the Court was careful to confine its decision to the particular case.

And, if the Texas Statute is so construed, Petitioner will be deprived of its properties and rights without due process of law. As for instance, while requiring Petitioner by the Act to regulate commerce, to permit its cars and engines to run into Texas, and to permit Garnishee to collect its freight and passenger charges, which it must do, to then further require Petitioner to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other States on causes originating in other States and having no relation whatever to any traffic or transportation to or from El Paso, or to any business or thing, is not due process of law; but, this is the identical result if the Texas Statute under consideration may be enforced in the circumstances as are herein presented.

Again, and having reference to the cars, engines and other equipment in the possession of the Garnishee and covered by its answer, there is the further fact that all of these instrumentalities came to the Garnishee under a contract between it and Petitioner, under the terms of which contract Garnishee was entitled to the use of this equipment in the conduct of its business. Now, may this contract be interfered with, as has been the effect of the garnishment proceedings? We say, No. And in this we are supported by the Supreme Court of Massachusetts. In Koontz v. B. & O. Railroad, 107 N. E. 973, a proceeding similar to this was instituted, prior, however to the Amendment of the

Interstate Commerce Act and the passage of the Transportation Act of 1920. It appeared in that case that the New York, New Haven and Hartford Railroad Company had certain cars in its possession belonging to the B. & O. Railroad which were attached. It was shown that the Trustee received the cars under an arrangement or agreement with the other line, which gave it the right to dispatch them to the place of destination on its own line instead of transferring the freight on its own cars. It was permitted to use the empty cars for carrying freight on its own road, etc. And after referring to the Davis case, the Court said:

> "The cars thus became, for the time being, a part of its equipment and compensation therefor ceased when they passed out of the Trustee's possession and control."

Under this state of fact, the Court said:

> "If the Trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. Brown v. Floersheim Mercantile Co., 206 Mass. 373, 376, 92 N. E. 494. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. R. L. c 189, pp. 57-65. Cornell v. Mahoney, 190 Mass. 295, 296. 76 N. E. 664; Thompson v. King, 173 Mass. 439, 53 N. E. 910. The bailment cannot be said to be violative of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service, and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trus-

> tee ought not to be subjected to the expense of unloading, and re-distribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if having been emptied they were collected and retained unused to await the result of the litigation. Van Camp Hardware Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Cox v. Central Vermont R. R. 187 Mass. 609, 73 N. E. 775. The trustee not being chargeable it becomes unnecessary to determine whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of R. L. c 167 p. 39, relating to the attachment of railroad cars in actual use making regular passages. The order of dismissal is affirmed, and the motion of the trustee to be discharged is granted."

We presume that the arrangement there was similar to the one existing in the case at the bar.

It is a familiar rule that a Statute may be fair on its face, and yet unconstitutional as applied to the particular facts of a given case, (Minnesota v. Barber, 136 U. S. 314), and under the facts of this case, we contend that the Texas Statute, Article 247a is void because the particular facts make the Statute, as applied, wholly unconstitutional. Now, what are these facts?

It is contended that service of the writ of garnishment, and impounding of funds thereunder, gave to the Texas Courts jurisdiction over petitioner, at least to the extent of the fund and rolling stock so impounded. Let us therefore examine the question with particular reference to the office of the writ of garnishment under the Texas Statutes.

It appears, without controversy, that petitioner is a foreign railroad corporation doing no business in Texas,

having no line of road in that State, and that the cause of action against petitioner arose in the State of New Mexico, and that at the time of the accident, the plaintiff was a citizen of the State of Colorado; that petitioner had and has more than sufficient assets in either of said States, as well as in the others through which it operates to more than satisfy any demand that plaintiff could establish against it, there being Courts in each of said jurisdictions wherein redress could be obtained.

That Garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, owns and operates a line of road from El Paso to the boundary between the States of Texas and New Mexico, where it connects with the line of petitioner, the two forming a continuous line from El Paso to various stations on the line of petitioner in the numerous states through which it operates.

That it is usual, and practically necessary, for freight charges on shipments originating on the line of petitioner to follow and be collected at El Paso, where same is the destination of shipment; that in the sale of tickets from El Paso to points on the line of petitioner, charge for the entire transit is collected at point of origin; that the cars and engines and other equipment of petitioner and used on the line of the Garnishee Company was so used under contract between the two carriers, under which Garnishee is entitled to the exclusive use and possession of same, while so in its possession, and that it is necessary that the cars of the petitioner containing shipments destined for El Paso should be run through to destination and that at all times it is required to allow this to be done; that all of the funds impounded under the writ of garnishment herein complained of represent the proportion due by the Garnishee to petitioner, not only on interstate business but solely for business

done by petitioner entirely beyond the limits of the State of Texas; that none of same was earned or accrued to petitioner for anything done or performed within the State of Texas and that such funds are needed by petitioner in the conduct of its business and in order to perform the service enjoined upon it by the laws of Congress, lawful rules of the Interstate Commerce Commission as well as the laws of the various States through which it operates, and that the equipment of petitioner in the hands of Garnishee at the time the writ was served was equipment so likewise needed and to be used by petitioner when the same should and in due course of business be returned to it.

We want, in this connection, to especially emphasize the fact that none of the funds so impounded had situs within the State of Texas, and that all of same accrued to this petitioner in the conduct of an interstate transportation business conducted as required by law, and all beyond the limits of the State of Texas.

The agreed statement of facts fully outlines the status of the relation between the two Companies and the rights of petitioner to the funds in question.

It is contended by the respondent that his proceding was justified by Article 247a of the Texas Statute, and that having complied with that and the succeeding Article, jurisdiction was obtained under the writ of garnishment and over this petitioner to the extent of the funds impounded.

It is the rule of decision in Texas that the right to the process of garnishment will be strictly construed against plaintiff in the writ, and every intendment will be indulged in favor of the Garnishee, Jameson v. Searborough, 56 Tex. 358, and many other cases.

Starting with the premise that prior to the passage of this Statute, there was no right to the issuance of the writ

of garnishment on an unliquidated demand, (Hochstadler v. Sam, 73 Tex. 315. Gro. Co. v. T & P Ry. Co. 95 Tex. 486. Armengol v. Richter, 141 S. W. 1028) we say that the Statute in question does not authorize its issuance. Attachment and garnishment are not one and the same, and without a Statute authorizing, neither process can issue in any cause. By its terms, this Statute only permits the issuance of attachment and nowhere authorizes the process of garnishment. Bear in mind that under the writ of attachment in this proceeding no property was found. Whatever was obtained was under the writ of garnishment; in fact a debt is not capable of manual seizure, and therefore cannot be reached under attachment. C. R. I. & P. Ry. v. Sturm, 174 U. S., 715.

Believing as we do, that the rule is universal that the right to the extraordinary process of garnishment is strictly construed, and nothing will be allowed by way of intendment in favor of the right, the Statute clearly negatives an intent to authorize its issuance.

It will be presumed that the Legislature knew the state of the law in Texas at the time this Act was passed, and that it had been held that the process of garnishment could not issue in aid of an action for damages, and this knowledge being charged to the Legislature and the Act not directly authorizing its issuance on an unliquidated demand, we are warranted in assuming that the act expressed all that the Legislature intended by way of enlargement on the right to extraordinary process, and not only may we confidently so assume, but as a matter of law, there was no enlargement as to the right to the process of garnishment. The fact that under the original garnishment Statute the writ might issue where it was made to appear that attachment, with affidavit and bond therefor, had been made, cannot aid

for the reason that under the original garnishment Statute the cause of action declared upon must be liquidated, and it is only where the demand is liquidated that the writ of garnishment may issue by virtue of a previous affidavit and bond in attachment or garnishment. The Statute in question was and is only an enlargement of the right to the writ of attachment, as same had previously existed, and under the circumstances made there to appear. So that we say the Statute itself negatives the right to the process used in this case to obtain jurisdiction over petitioner.

Again, we assert that under the Statutes authorizing attachment and garnishment, the process issued herein fixed no lien which could be enforced against the property impounded.

A review of Chapters 1 and 2, Title II, Revised Statutes of the State of Texas will, as we believe lead to the conclusion that the service of the writ of attachment or garnishment only creates a lien which can be enforced in some of the methods pointed out in these chapters, AFTER a valid judgment has been obtained against the original defendant.

Under the heading "Attachments" Article 267 provides in effect that the execution of a writ of attachment creates a lien from the date of the levy on such personal property as remains in the hands of the attaching officer and the proceeds of such personal property as may have been sold.

Article 268 provides that should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens.

As to garnishments, Article 293 provides for a judgment against the Garnishee for the amount admitted or found to to be due, unless such amount shall exceed the amount of

plaintiff's judgment against the defendant, in which case it shall be for the amount of the judgment, interest and costs. Please note that this Article presupposes judgment aginst the original defendant.

Article 294 provides that where it appears from Garnishee's answer that Garnishee has effects of the defendant liable to execution, the Court shall render a decree requiring the Garnishee to deliver up to the Sheriff presenting an execution in favor of the plaintiff against the defendant, such effects or so much thereof as may be necessary to satisfy the execution.

In short, it definitely appears from these various provisions that under the Statutes of Texas plaintiff must obtain a valid personal judgment against the original defendant on which the lien may be foreclosed or under which, when an execution issues, property may be sold in some of the methods designated.

As said above, the judgment entered in the garnishment proceeding always pre-supposes a valid judgment against the original defendant. The Supreme Court of Texas has in effect so held. Sun Mutual Insurance Company v. Seeligson, 59 Texas 3, Kelly v. Gibbs, 84 Texas 147. We quote from the Seeligson case:

> "It is true that there can be no valid judgment against a Garnishee unless there be a judgment against the defendant, and for this reason Garnishee is entitled to have an inquiry made as to whether or not, when a Court has assumed to render a judgment against a defendant it had jurisdiction over his person and over the subject matter of the suit, for if it had not, a judgment against the Garnishee would be no protection to him.

"If, however, the Court had jurisdiction of the person of the defendant and of the subject matter of the suit, then the Garnishee cannot be heard to question the conclusiveness of the judgment as between the plaintiff and the defendant, for the judgment against himself in such case will be full protection to him for any payment he may make under it.

"The Garnishee not only has the right to resist a judgment against himself until there is a valid judgment against his creditor or the person for whom he holds property, but he has the right and it is his duty to resist a judgment against himself until the Court has jurisdiction over him; otherwise any payment he might make would be a voluntary payment and the judgment would be no protection to him, for it would not be binding upon him if the Court which rendered it had no jurisdiction over him."

It may be that the Legislature could have provided in case of a non-resident for the rendition of a judgment against him to the extent of the property impounded, this in the nature of a judgment in rem, but, there is no such provision. The Legislature has not so provided, and as the Court may not legislate or exercise the function of a Legislature, neither may they supplement an Act of the Legislature, and because of this we urge that the only legal effect, in any event, that may given to Article 247a supra is to hold that it creates a lien or impounds property to be held in legal custody until such time as plaintiff may secure a valid judgment against the defendant, and such a judgment cannot be obtained in Texas against a corporation that is not doing business in the State. A. T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513.

And it occurs to us that unless this construction is placed upon the Article 247a, it is directly in the face of Pennoyer v. Neff., 95 U. S. 714. It may not be amiss in this connection to quote from that case at page 728:

> "But the answer to this position has already been given in the statement that the jurisdiction of the Court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect can not be made to depend upon the facts to be ascertained after it has tried the case and rendered judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void when rendered will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

We may, in this connection, refer to Hochstadler v. Sam, 73 Tex. 315, in which it is held that where jurisdiction is sought by virtue of an attachment, if the attachment fails, there is no jurisdiction.

We must be mindful that, as a general proposition, petitioner is not subject to the jurisdiction of the Courts in Texas, and therefore, that no personal judgment can be entered against it in that State, without a voluntary submission to jurisdiction.

The Article 247a of the Statutes of that State must be construed in connection with the other Articles of Chapter 1, Title II, Revised Statutes. And the only Constitutional effect that can be given to this Article 247a is to construe the same as giving a lien upon tangible property located within the State, and to make the proceedings one in rem only, and when this construction is so placed there is the want of authority to foreclose the lien so fixed until there has been rendered a valid judgment against the original defendant.

Of course, the service by publication sought to be obtained against this petitioner would not support a judgment and as the judgment rendered against this petitioner on such service was void, it certainly was not vitalized, nor the judgment entered more effective by reason of a subsequent judgment against the Garnishee. The vitality of the judgment against the original defendant must be determined as of the time when it was entered and cannot become more effective by reason of a subsequent proceeding against a Garnishee. Again we quote from Pennoyer v. Neff. At page 727, it is stated:

> "In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligations upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

So that as there is no Statute in Texas authorizing as against a non-resident judgment against him to the extent of property impounded and as the Courts may not import into a Statute any additions thereto, the conclusion would seem to be forced that in the present proceeding there could be no valid judgment rendered against the Garnishee until a proper judgment had been entered against the original defendant.

It has been held that the original defendant is not required to take notice of a garnishment proceeding and is not concluded by the judgment entered therein. Mo. Pac. Ry. Co. v. Whipsker, 77 Texas 16.

Not only so, but every intendment should be indulged in favor of the absent defendant and Statutes which seek to subject him to the jurisdiction of a foreign Court are never liberally construed. As indicating the modern trend, we

quote from Missouri Pacific Ry. Co. v. Clarendon Boat Oar Co. 42 Sup. Court Rep. 211. wherein Chief Justice Taft used this language:

> "Provisions for making foreign corporations subject to service in the State is a matter of Legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. Indeed, so clear is this that in dealing with Statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State."

And, as such then is what is therein designated the "leaning" of the court as to foreign corporations doing business in a State. how much stronger would be this leaning as applied to foreign corporations who have been adjudged not be responsive to litigation within the State?

It is admitted that the cause of action arose in the State of New Mexico, at which time Wells was a resident of the State of Colorado; that his claim was an unliquidated demand; that there are in the States of Colorado and New Mexico Courts wherein he might assert any cause of action he may have against petitioner, and that petitioner is financially able to respond to any judgment which he might recover against it; that it has in the States of New Mexico and Colorado, as well as other states through which it

operates. property subject to execution of value many thousand times greater than any liability which might be found to exist against it on any cause to be so asserted. (Printed record, 69-70).

That in said cause so to be asserted, the witness in behalf of the Railroad Company, material to its defense, are employees, whose attendance would be necessary and during which attendance they would be required to absent themselves from their usual and customary labors and the Railroad Company would be deprived of their services from such ordinary and customary labors during the time of their attendance upon the Court, for which attendance the Railroad Company would be required to pay their expenses and compensation for loss of time; that said witnesses reside in San Marcial, New Mexico, about one hundred and fifty (150) miles from El Paso. (Printed record 74).

That petitioner operates lines of railroad through many Counties in New Mexico, including the County of Socorro, where plaintiff claims to have been injured, and in which County it has agents upon whom process could be served, as well as Courts having jurisdiction of his cause of action. (Printed record 75).

That for many years prior to the entry of the final decree in the case of petitioner against J. F. Weeks, et al Numbered 109 In Equity on the docket of the District Court of the United States, Western District of Texas, it had been the practice of the attorneys residing in El Paso to institute suit against petitioner in the Courts of El Paso County, Texas for injuries occurring to persons in the States of Illinois, Kansas, Colorado, New Mexico, Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that

there had been filed prior to the time plaintiff exhibited its bill in the Weeks case, and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State Courts of El Paso County, Texas for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases in order to prevent default it was necessary for petitioner to defend in said causes, and it so defended said cases by bringing numerous employees from their regular work in such other States to El Paso to testify, and during the absence of said employee witnesses from their regular work, substitutes were employed at expense to perform the services of said employees; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State Courts of El Paso County, Texas against petitioner until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against petitioner been instituted in any State through which petitioner operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought. (Printed record 81-82).

And under this state of facts, we assert that this is not a bona fide cause in which plaintiff undertook to subject the property of petitioner to the payment of the asserted claim so made in a foreign jurisdiction, but rather that same is an effort to compel this petitioner to come into Texas to defend a personal suit. We quote again from Pennoyer v. Neff, 95 U. S., beginning on page 723:

> "So the State through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sover-

eignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate."

It is not pretended that this is an effort to subject the property of the Railroad Company to satisfy *any claim of a citizen of Texas against it*. Wells was not such a citizen, but it appears to us to be a rather bold-faced effort to import litigation into Texas, and to force the Railroad Company to appear in that State to defend an action against it which is really in personae. Again we quote from Pennoyer v. Neff, wherein the Court cites the following from Boswell's Lessee v. Otis, 9 Howard 336, as follows:

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

The Court in Pennoyer v. Neff at page 734 also used this language:

> "It is true, that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

It is submitted that under the record herein, as well as the history of the many cases formerly imported into Texas, this cannot be and is not subtantially a proceeding in rem; and that there was no direct purpose to reach and dispose of any property owned by petitioner in Texas. But as before said, that such procedure was adopted merely and only for the avowed purpose of securing a really unfair advantage. It seems perfectly plain that both Wells and his attorneys knew that it was not necessary to either attach or garnishee any property of petitioner in order to save to them an alleged debt. We again quote from Pennoyer v. Neff, pages 730 and 731:

> "As was stated in a subsequent case, the doctrine of this court is, that the act 'was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its results, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.' The Lafayette Insurance Company v. French et al, 18 How. 404.

"In all the cases brought in the State and Federal courts where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interest in property within the State to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

The real and only just purpose and object to be obtained under the writ of foreign attachment is to secure a claim that can be secured in no other way. A reading of the entire opinion in Pennoyer v. Neff as well as other cases, would seem to be convincing that such is the real office of the writ and the use thereof never justified where the

defendant has assets at the place of residence of either himself or the claimant more than sufficient to satisfy any judgment that may be asserted, and we here and now attack the good faith of any proceeding wherein it appears that at the place where the accident arose, as well as at the place where the claimant resides, the defendant had assets of far greater value than any amount to be claimed, which could be reached in an orderly way under process regularly issued, and yet, such claimant declines to proceed as by law authorized in such cases, but hies himself to a foreign jurisdiction where neither he nor defendant has a domicile, and undertakes to tie up, by extraordinary writ, property of the defendant, which is being used in an orderly way and in the conduct of a business that is essential not only to the well being and happiness, but to the real necessity of the public at large, and to permit such claimant, in these circumstances, to so clog the wheels of commerce and interfere with the orderly process of interstate transportation and tie up its instrumentalities is under the circumstances wholly indefensible. And, to construe a State Statute as authorizing such a procedure would and will be to a railroad company, whose property is thus impounded, lacking in due process of law, and a denial to it of the equal protection of the laws.

It's worse than folly to contend, under the admitted facts, that it was the intention of the plaintiff in the original action to institute a proceeding in rem. This must address itself to the judicial mind, and unless the real object of that proceeding was one in rem the entire effort should fail. Under such circumstances, every doubt should be resolved against the regularity and good faith of the proceeding. In this connection we can do no better than quote what was said by the Circuit Court of Appeals in A. T. & S. F. v. Weeks. We quote the closing paragraph:

"When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to the railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal."

If the position taken there was sound, the situation presented by this bill would make its application more ob-

vious than then appeared. The property of a Railroad Company has a fixed situs and may be readily reached. And, again we say that the real object of the suit instituted by Wells, as seems to be plainly indicated from the statement of facts, is and was to force this Railroad Company to litigate personal actions in Texas, and that the assumed proceeding in rem was not only more fanciful than real, but there was no excuse for its attempted exercise.

It appears, under the Texas Statute, Article 247a, that the writ therein authorized is only permitted where the cause of action is against a non-resident. That is to say the article provides for the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained in this state founded in tort, or upon demands which are unliquidated, and as petitioner falls within the class of those upon which personal service cannot be obtained within the State of Texas, it is charged that this Article justifies the proceeding taken.

It is to be noted that the classification made is against non-residents; in other words, if service can be had on the given defendant within the State of Texas, there is, under this Statute, no right to the writ of attachment on unliquidated demands, and no right is, therefore by the Article, created except as against the non-resident. If the non-resident has an unliquidated demand against a citizen of Texas, he is denied the right to the writ of attachment. If one citizen of Texas has an unliquidated demand against another citizen of Texas, he may not sue out an attachment, but if demand is against one who does not reside within that State, such fact is enough in and of itself to allow the issuance of the writ. We contend that the Statute is for this reason inhibited under Section Two, Article Four of

the Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several states; that the Statute in question does deny to the non-resident a privilege and an immunity granted to citizens of Texas cannot, as we assume, be denied.

A simple example will suffice: If a non-resident has an unliquidated demand against a citizen of Texas he may not invoke this Statute; vice versa: if a citizen of Texas has such demand against a non-resident he may invoke the aid of the extraordinary process provided under the Statute. Plainly, this gives to the citizen of Texas a right denied to the citizen of another State.

As we understand the construction which has been placed upon this Section of the Constitution, its provisions are so broad as to include in one class every citizen of every State in the Union, and to neither or none shall a privilege be granted that is denied to any of the others. The Section has been construed many times, and as far back as Paul v Virginia, 8 Wallace 168, the broad construction above contended for was placed upon the Section. In Cole v. Cunningham, 133 U. S. 107, the Court said:

> "The intention of Section 2, Article 4, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

The Texas Statute does not include the right to institute actions in favor of a non-resident.

In Chambers v. B. & O. Railroad, 207 U. S. 142, the Court in passing upon a Statute of Ohio that gave a remedy for death of a citizen of that State, among other things, said:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. Corfield v. Coryell, 4 Wash. C. C. 371, 380 Fed. Cas. No. 3,230, per Washington J; Ward v. Maryland 12 Wall. 418, 430, 20 L. Ed. 449, 452, per Clifford, J.; Cole v. Cunningham, 133 U. S. 107, 114, 33 L. Ed. 538, 542, 10 Supt. Ct. Rep. 269, per Fuller Ch. J.; Blake v. McClung 172 U. S. 239, 252, 43 L. Ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J.
>
> "But subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states.

> The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from citizens of other states is void, because in conflict with the supreme law of the land."

The Circuit Court of Appeals for the Eighth Circuit in the recent case of Eggen v. Canadian Northern Railway 255 Fed. 937 held in passing upon a Statute of Minnesota, which provided that when a cause of action has arisen outside the State and an action thereon under the laws of the place it arose is barred by lapse of time, no such action shall be maintained in the State, unless plaintiff be a citizen of the State who has owned the cause of action since accrual, violates this provision of the Constitution, that the provision aims at unified nationality as opposed to confederation.

It would seem to be apparent that the object of this Statute was to confer jurisdiction in Texas Courts on causes of action for damages against foreign corporations not doing business in the State. We may as well face the situation candidly and call things by their right name, in so doing. The object of this Statute was to benefit the damage suit lawyer in Texas who had secured a claim against a railroad not operating in that State. The Statute might properly have been labeled: "A clean bill of health to the damage suit industry," inviting it to import its litigation arising elsewhere into Texas, and as against which we again invoke the closing remarks of the Circuit Court of Appeals in the Weeks case, supra.

While there may be some who deny, yet we are among others who are unwilling to admit that our Constitution is meaningless or that it fails to be an ark of safety, guaran-

teeing a security that may not be abridged even in the interest of the self-sacrificing damage-suit industry, and if the particular section of that time-honored confession of faith may be invoked in behalf of a foreign corporation whose rights have been unquestionably invaded, then, that this Article of the Texas Statutes flies in the face of it will not admit of doubt.

It occurs to us that the circumstances, as made to appear in this case, justify the Court in extending every doubt in favor of petitioner. And, we think the question may well be asked: Why the extreme effort to bring actions of this kind in El Paso County, Texas? Are there not many Courts of competent jurisdiction within each of the States that have admitted jurisdiction over the Santa Fe Railroad Company, wherein causes of action against it may be heard? Is it not entirely solvent and able to respond to any demand that a litigant shall reduce to judgment within any of those jurisdictions? Did this cause of action arise within the State of Texas? Was not the service in which plaintiff was unfortunately injured performed in some other jurisdiction than Texas? Why, then, we again ask, assuming that the answers to each of these questions may be readily given, is there the untiring effort to import this litigation into Texas?

We candidly believe that the Court is justified in searching these questions, and that such search is entirely legitimate in order to properly determine the various propositions that have been herein presented. Believing that thereby the Court will be enabled to apply the law regulating interstate transportation companies and the applicable provisions of the Constitution of the United States, and thus render a decree that will give to the petitioner the protection it deserves, and at the same time will be just and fair to both

parties, holding, as you must that Wells has no inherent right to institute suit in Texas, and that it is only by reason of what we are pleased to call "a fiction" which gives him any character of standing in the Courts of Texas and because of which we contend that petitioner is undoubtedly entitled to that "leaning" referred to by Chief Justice Taft in the Clarendon Boat Oar case. It is the duty of the Court in construing a Statute not only to consider the plain import of the words used, but likewise the effect of the construction placed, having in mind the object sought. If the action here under consideration can be maintained, then a suit similar could be brought in Texas against the Boston & Maine Railroad at any place within the State where a traffic balance in favor of the Boston & Maine may be found. In other words, practically expressed: A suit for personal injuries could be filed in Texas against any railroad in the United States by the simple method of running a garnishment on a Texas line and tieing up the traffic balance of the defendant railroad, and surely it will not be contended that such a construction would accord with the requirements of the Interstate Commerce Act or the Transportation Act of 1920, or the protective provisions of the Constitution of the United States.

We want again to emphasize the point that the process of foreign attachment cannot be constitutionally considered as applicable to a solvent defendant, whose situs is permanently fixed, and when used in these circumstances, a legal fraud is committed, resulting in deprivation of rights to a defendant which he should be able to confidently repel at all times, and that is precisely the situation presented here. We cannot be made to believe that a solvent, going concern that has a fixed place of abode known of all men, with property subject to execution at given places and like

wise known of all men, may be yanked at the will or caprice of a claimant into a jurisdiction where neither of them has a residence by the use of the process of garnishment or attachment. Such writs are never allowable when ordinary process will suffice. Otherwise, the provisions of our Constitution become as to a defendant situated as here presented, a sounding bell and tinkling cymbal. mere beautiful words only are its provisions having in reality however nothing of substance that may be used by the injured.

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No. 877232

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IN THE

SUPREME COURT

OF THE UNITED STATES

15

OCTOBER TERM, 1922

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

vs.

EDMUND R. WELLS, et al

No._____

ANSWER TO PETITION FOR CERTIORARI

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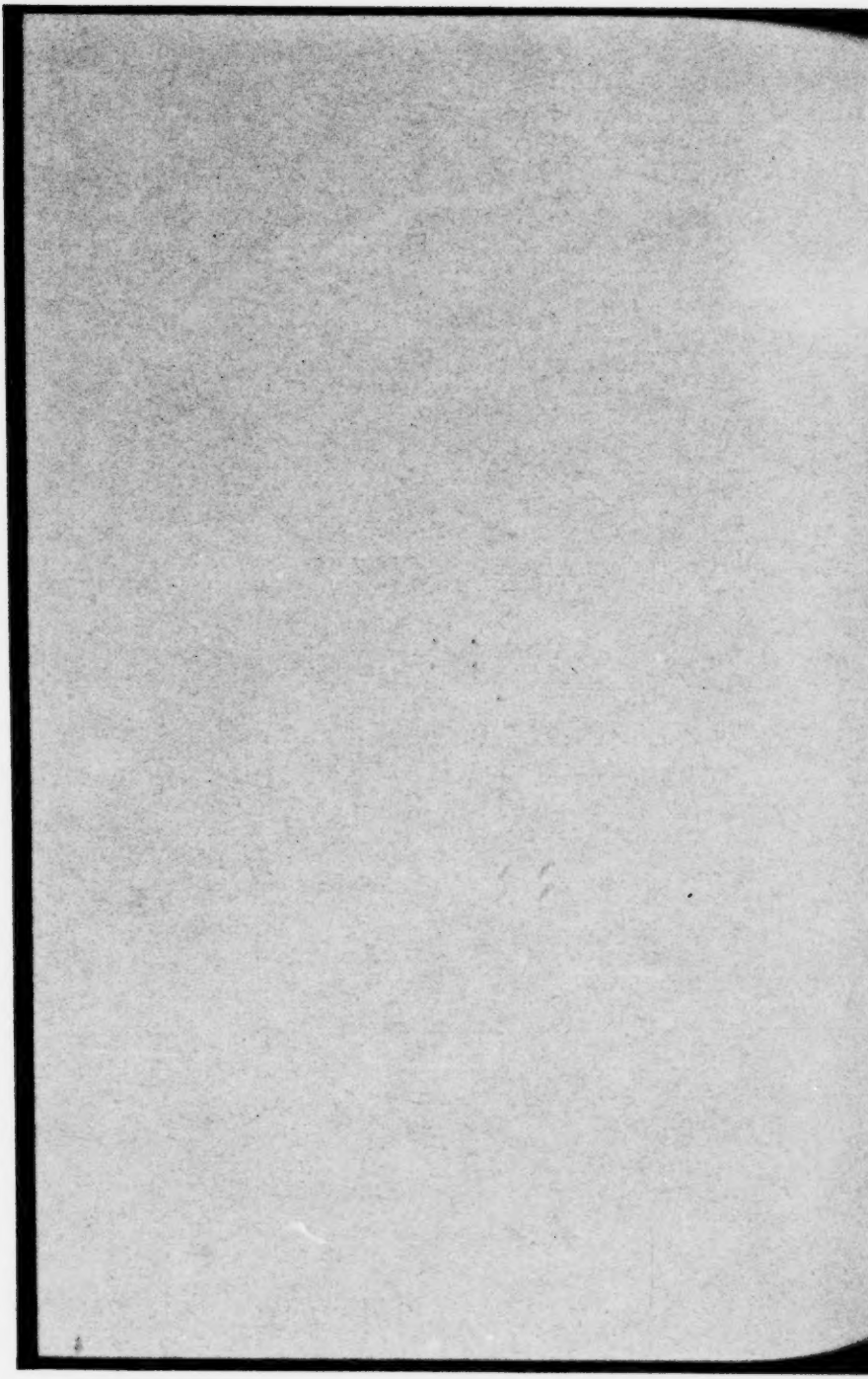

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In addition to the reasons given in the opinion of the Circuit Court of Appeals we urge the following:

No property was impounded or condemned. The only judgment was one for money against the garnishee on the ground that it was indebted to the original defendant.

1. Even if the State Court erred in rendering judgment against the garnishee such error was one of law alone; and the court having jurisdiction over the person of the garnishee, a resident of Texas and personally served in that state with process, the only relief from such error

was by appeal or writ of error. The judgment cannot be set aside or held void in this collateral proceeding.

Marin v. Augedahl 247 U. S. 142 (62:1038).
Waples Painter Co. vs. Ross, 107 Tex. 215 176 SW 47.
Freeman on Void Jud. Sales, Sec. 20.
Menard v. MacDonald, 115 S. W. 63.
Odle v. Frost, 59 Tex. 684.
Bank of Cumberland v. Simpson (Ky), 77 S. W. 695.
Goodman v. Henley, 80 Tex. 499.
Farmer v. Saunders, 128 S. W. 941.
Wagley v. Wagley, 230 S. W. 493.
Black on Jud., Sec. 329.

2. The suit of Wells against the Atchison, Topeka & Santa Fe Ry. Co. was so far a separate suit from the garnishment sued out against the garnishee, under our garnishment statutes as construed by the Supreme Court of Texas, that the judgment for Wells against the garnishee does not prevent the petitioner from suing and recovering against the garnishee for the same debt, and thus subjecting the garnishee to a double recovery, where the garnishee fails as it did in this case, to either make the original defendant party to the garnishment or appeal from the judgment against the garnishee.

Ry. v. Whipsker 77 Tex. 14, 13 SW 639;
Waples Painter Co. v. Ross 107 Tex. 215, 176 SW 47;
Sun Etc. Co. v. Seeligson 59 Tex. 3.

Therefore, the original defendant (the petitioner herein) has no interest in enjoining the judgment against the garnishee, not being prejudiced thereby; nor can it enjoin the judment rendered against it because such judgment

does not purport to bind it personally, but only so far as might be satisfied out of the judgment against the garnishee.

3. If the judgment against the garnishee is only erroneous in matter of law, it is not void and can't be enjoined in this collateral proceeding. If such judgment is void then it is no obstacle in the way of the petitioner recovering of the garnishee any demand it may otherwise have.

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Attorneys for Respondents.

WM. R. STANSBU
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IN THE

SUPREME COURT

OF THE UNITED STATES

16

OCTOBER TERM, A. D. 1923.

No. 232

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner Appellant,

vs.

EDMUND R. WELLS, ET AL.,
Respondents.

BRIEF AND ARGUMENT
in Behalf of Petitioner Appellant.

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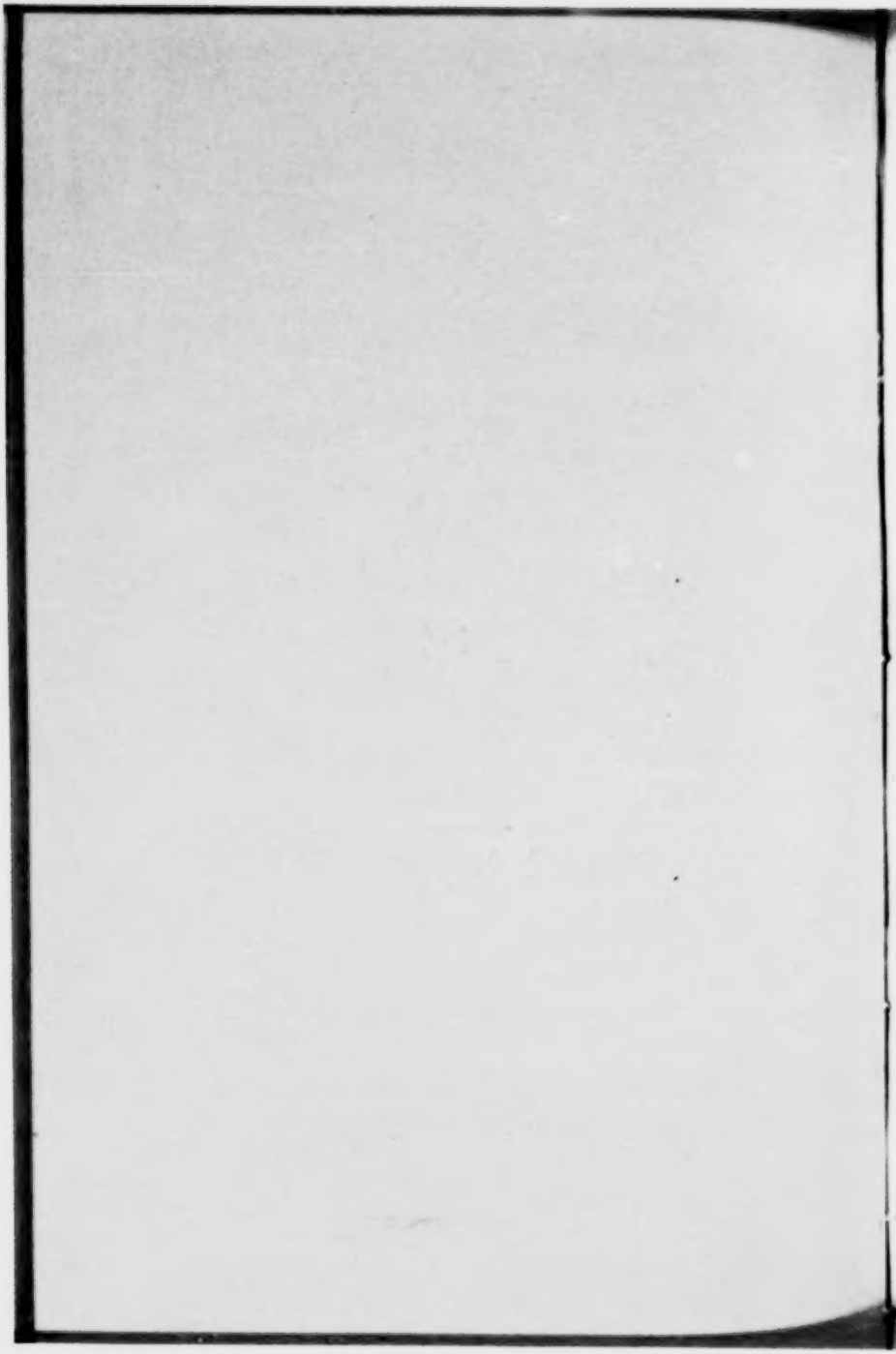

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IN THE

SUPREME COURT

of the United States

OCTOBER TERM, A. D. 1923.

No. 232

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner Appellant,

vs.

EDMUND R. WELLS, ET AL.,
Respondents.

BRIEF AND ARGUMENT

in Behalf of Petitioner Appellant

Petitioner appellant filed its bill in the United States District Court, Western District of Texas, complaining of respondent Wells as plaintiff and the other respondents as his attorneys of record, who claimed an interest in the judgment, and in which bill it was averred that respondent Wells as plaintiff, a citizen and resident of the State of Colorado, through the other respondents as his attorneys of record, had instituted suit in a State court of Texas against petitioner, a railroad corporation organized and existing under the laws of the State of Kansas and a resident and citizen of said State, for personal injuries alleged to have been sustained by Wells in the State of New Mexico; that in said suit

service had been attempted by publishing notice thereof in a newspaper published in El Paso, Texas; as provided under the laws of Texas; likewise by delivering a copy of said citation and certified copy of petition to the secretary and treasurer of respondent at its office in Topeka, Shawnee County, Kansas; that at the time of filing said suit affidavit was made to the effect that the suit was one against a foreign corporation and that personal service could not be obtained within the State of Texas and that cause of action was founded upon a demand which was unliquidated. Bond was made, and based on said affidavit a writ of attachment was issued, commanding the sheriff of El Paso County, Texas, to attach forthwith so much of the property of petitioner, if to be found in said county, as should be of the value of $15,000.00, same being the amount of damages sought by Wells; that the writ of attachment so issued was by said sheriff returned, not executed, for the reason that no property subject to attachment, belonging to petitioner, could be found in El Paso County, Texas; whereupon Wells, through one of his attorneys, made further affidavit to the effect that the original attachment had been issued and that he believed the Rio Grande, El Paso & Santa Fe Railway Company, a corporation organized under the laws of the State of Texas, a common carrier doing business in El Paso County, Texas, was indebted to petitioner and asked that a writ of garnishment issue. This was done and thereunder said Rio Grande, El Paso & Santa Fe Railway Company was required to answer, under oath, what effects of petitioner it had in its possession and had when said writ was served, and

what other persons within its knowledge were indebted to petitioner. The Rio Grande, El Paso & Santa Fe Railway Company in response to said writ answered that it held certain equipment of petitioner and likewise was indebted to it in the sum of about $151,000.00 for traffic balances. It denied, however, liability under the writ of garnishment on the same grounds that were made the basis of the bill above referred to and made basis of the prayer for injunction by petitioner in the United States District Court. That petitioner did not appear at the November term of the State court to which it had been cited by publication and by notice served upon its secretary and treasurer at Topeka and in no way submitted itself to the jurisdiction of said State court, and on December 21, 1921, that when said case was called for trial, judgment by default was taken against it in the sum of $4,000.00 and on January 24, 1922, judgment was entered in the garnishment suit filed against the Rio Grande, El Paso & Santa Fe Railway Company, wherein all the defenses interposed by it were held for naught and it appearing that garnishee held assets belonging to petitioner of greater value than the amount of the judgment which had been entered against petitioner by default, like judgment was entered against garnishee in the sum of $4,000.00, and that because of which the garnishee was withholding from respondent a sum sufficient to pay the amount thereof.

It was further averred in the bill that petitioner owns and operates lines of railway in the States of Illinois, Iowa, Missouri, Kansas, Nebraska, Colorado, Oklahoma, New Mexico, Arizona, California and Nevada and

is a common carrier of freights and passengers for hire in each of said States; that it does not own nor operate any line of railway in the State of Texas and is not engaged in its business as a common carrier in said State, nor has it done so since the first day of April, 1914; that under the laws of the State of Texas as construed by its courts, no special appearance could be entered by petitioner in the case filed by Wells against it in the State court for personal injuries for the purpose of testing the service of citation nor for the purpose of testing the jurisdiction of the court over it, for that under the said laws an appearance for any purpose will be and is held a general appearance for all purposes and it would thereby have been subjected to the jurisdiction of said court for all purposes, which would have made it necessary for it to have gone to the unusual and unnecessary expense of bringing witnesses from New Mexico in order to make proper defense in said cause, which would have been an unwarranted burden upon and against it and upon interstate commerce, and that the judgment entered against it was without proper service and without appearance; that the issuance of the writs of attachment and garnishment under the circumstances appearing, did not confer jurisdiction upon the courts over it, nor did they fix a lien on the properties of complainant which could be made the basis of a judgment in rem; that any statute of the State of Texas which undertakes to so confer authority and give jurisdiction is void and the attempted enforcement of same would and will deprive petitioner of its property without due process of law, constitute a denial to it of the equal protection of the law,

and contrary to the provisions of the Interstate Commerce Act, 1906, as amended, as well as the Transportation Act of 1920, and that the Legislature of Texas is and was without power to fix jurisdiction in causes of action such as declared upon by Wells or to fix any lien on or against funds or property belonging to complainant that may be in the possession of a resident of Texas; that the moneys and properties impounded under the garnishment proceeding were not subject thereto and plaintiff in the writ obtained no lien thereon which could be foreclosed prior to the entry of a valid judgment against petitioner; that the funds so impounded represented balances due to petitioner from garnishee as its proportion of transportation charges due entirely on interstate traffic, earned entirely on business conducted wholly without the State of Texas, and which funds were needed in the carrying on of its transportation business beyond the limits of the State of Texas, and to withhold the same under the writ of garnishment would be violative of the amended Act to Regulate Commerce, as well as the Transportation Act of 1920, and would be an undue burden on interstate commerce; that the cars, engines and other railroad equipment impounded under said writ, were lawfully in the possession of garnishee under contract with petitioner, under and by which garnishee was entitled to possession thereof as a common carrier of interstate freights and passengers, all such having been delivered to garnishee by petitioner as a connecting carrier and which would have been returned to it in due course of business and were each and all needed by complainant

in the conduct of its business as an interstate carrier and none of same is or was subject to the writ of garnishment and that to withhold the same was violative of the provisions of the Interstate Commerce Act as well as the Transportation Act of 1920, and the equipment so impounded was beyond the reach of process of the District Court of El Paso County, Texas; that for many years it has been the custom of carriers to allow their freight charges to follow the shipment so that the delivering line collects the entire freight charges of all carriers over whose lines the shipment moves, and the delivering carrier accounts to the other carriers for their proportion of the transportation collected; that for many years it has been the custom, for the convenience of passengers, for the initial line to sell tickets and coupons good for transportation over connecting lines and to collect from the passenger the entire amount and account to the connecting lines for its or their proportion thereof; that garnishee owns a railroad only twenty miles in length extending from El Paso to the Texas-New Mexico State line, where it connects with the railroad of complainant; that El Paso has a population of more than 50,000 people and has a large commerce originating therein and passing through; that in order to properly serve that community and its commerce without subjecting it to undue prejudice, disadvantage or discrimination and to comply with the provisions of the Act to Regulate Commerce, it is necessary for petitioner, as it has done in the past, to permit its cars and engines to run over the railroad of the garnishee to and from El Paso and to permit gar-

nishee to collect the freight charges and the portion thereof accruing to petitioner from freight passing over its line to El Paso, and to permit garnishee to sell tickets good for passage over petitioner's line; that the moneys due complainant by garnishee and impounded under the writ of garnishment were moneys so collected and if the statutes of the State of Texas are so construed as to authorize the seizure by attachment of its cars and engines while in the possession of garnishee or to authorize the seizure by garnishment of the moneys due and to become due petitioner by the garnishee for freight and passenger charges for account of petitioner, such statutes so construed will impede and obstruct petitioner in the performance of the duties imposed upon it by the Act to Regulate Commerce and will obstruct and be a burden on interstate commerce and the Interstate Commerce Commission in the performance of its duties imposed by the act and the said statutes so construed will deprive complainant of its property and rights without due process of law; since it is not due process of law when requiring complainant by the Act to Regulate Commerce to permit its cars and engines to run into El Paso and to permit the garnishee to collect its freight and passenger charges and then to require petitioner to submit to the jurisdiction of the State courts at El Paso on causes of action by citizens and residents of other States, originating in such other States, which have no relation whatever to any traffic or transportation to or from El Paso or to any business or thing therein, and such would be the result if the procedure resorted to and herein complained of should be sustained, and such

statutes so construed would be and are contrary to the constitution of the United States and the laws enacted thereunder, and by reason of said writ of garnishment petitioner is deprived of the use and benefit of the funds so withheld.

It was further averred that demand for payment of the judgment above referred to had been made, that the garnishee would comply with the command unless the enforcement of the judgment is prevented, and if the amount is paid petitioner would have no recourse at law as Wells is insolvent and the amount of the judgment so paid to him could not be recovered and same would not be voluntarily returned, and that to withhold the said funds would be violative of the constitutional immunities to which it is entitled; that it has been judicially determined that petitioner is not doing business in Texas and is not subject to the jurisdiction of the courts therein and that it will work a great hardship upon it and be a burden upon interstate commerce, violative of the constitution to require it to litigate suits originating in other jurisdictions in El Paso and in which it will be necessary to bring its witnesses from long distances at great expense, all of which is wholly unnecessary, there being courts of competent jurisdiction in each of the States through which it runs and does business, wherein any and every cause of action against it may be heard and determined, and that the attempted garnishment herein was not a bona fide effort to reach the assets of petitioner, it being amply solvent and having property more than amply sufficient, subject to execution, in each of the States through which it operates and does busi-

ness to more than satisfy any demand that Wells might have against it; that the institution of said suit by Wells in the District Court of El Paso County, Texas, and the issuance and service of the writ of garnishment herein is part of a general scheme to re-establish jurisdiction in El Paso county in causes of action such as was declared upon by Wells and further causes of action arising in other States against foreign railway corporations, and this petitioner in particular, and for petitioner to submit thereto would be a burden on interstate commerce and hamper it in its business as a common carrier without the State of Texas and subject it to the great and unnecessary expense of litigation far removed from the scene where the cause of action against it arose; that it would be greatly hampered in its defense therein in that its witnesses would be required to come great distances at added expense, which would be a burden upon interstate commerce and in addition to which it would be required to substitute the services of other and less experienced employes than those who were required to be absent from their labors, and that it should not be required to waive its constitutional right which has thus been invaded; that there is no just, lawful or equitable reason or cause why such suits could not be instituted and prosecuted in the respective States where the injury occurred and where service can be had upon petitioner and the issues fairly determined.

The defendants named in said bill for injunction each waived notice and filed answer to the merits and the cause was submitted on an agreed statement of facts, and in said statement the matters of fact as averred in

the bill of complaint were admitted, and wherein it further appeared that prior to the entry of the decree in the case of petitioner against J. F. Weeks, et al, numbered 109 in Equity on the docket of the District Court of the United States, Western District of Texas, it was determined that petitioner was not doing business in Texas and not subject to suit within said State, and that it had been the practice of attorneys residing in El Paso to institute suits against it in the State courts for personal injuries arising in the States of Illinos, Kansas, Colorado, New Mexco, Arizona, Missouri and California, and wherein the plaintiffs, respectively, were nonresidents of the State of Texas; that there had been filed prior to the time the bill was exhibited in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State courts of El Paso County for personal injuries occurring in the States above named, and in which many thousands of dollars were involved, and in which cases, in order to prevent default, it was necessary for petitioner to defend and it so defended by bringing numerous employes from their regular work in such other States to El Paso to testify, and during the absence of said employe witnesses from their regular work substitutes were employed at great expense to perform the services of said employes; that since the entry of the final decree in the Weeks case no suits had been filed in the State courts of El Paso County against petitioner until the institution of the suit herein complained of, and that had the Wells case been instituted in any State through which petitioner operates it would have filed

answer denying liability and have defended to the extent of its ability.

That in 1913 the Legislature passed an act now known as Chapter 247 A, Revised Statutes of Texas, which reads as follows:

> "An Act to amend Chapter One, Title Eleven, of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247-A, providing for the issuance of attachments in suits against persons, co-partnerships, associations or corporations, upon whom personal service can not be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.
>
> "Be it enacted by the Legislature of the State of Texas:
>
> "Section 1. That Chapter One of Title Eleven of the Revised Civil Statutes of this State, adopted in the year A. D. 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247 A, as follows:
>
> "Art. 247 a. Provided that nothing in this chapter shall prevent the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service can not be obtained within this State, founded in tort or upon demands, which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attachment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

"Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage and it is so enacted.

"(Note.—H. B. No. 57 was passed by the House by a two-thirds vote: yeas 104, nays 3; and was passed by the Senate by a two-thirds vote: yeas 28, nays 0).

"Received in the Executive Office August 19, 1913, and filed in the Department of State August 20, 1913, without the approval of the Governor.

"Became a law August 20, 1913."

The United States District Court denied relief sought by petitioner and from this decree an appeal was prosecuted to the United States Circuit Court of Appeals, Fifth Circuit, and the decree entered below was by that court affirmed. All questions arising on the record were duly presented by proper assignments of error and petitioner appellant respectfully here presents on the record the following as its

BRIEF OF ARGUMENT

Some of the questions arising on the record grow out of the Texas Statute as written and others involve the larger question as to the effect of this statute when attempt is made to enforce same against an interstate carrier under the circumstances existing in a cause such as this. We therefore ask permission to present our

views upon each of these questions, not, probably, in the order of their importance, but as they seem to arise.

FIRST: THE TEXAS STATUTE, ARTICLE 247 A, DID NOT AUTHORIZE THE ISSUANCE OF THE WRIT OF GARNISHMENT.

Prior to the passage of this act neither the writs of attachment nor garnishment could issue in an action founded upon an unliquidated demand under the laws of Texas. Such writs could issue only where the amount of the demand was certain or liquidated.

Hochstadler vs. Sam, 73 Texas 315.

Grocery Co. vs. T. & P. Railway Co., 95 Texas 486.

Armengol vs. Richter, 141 S. W. R. 1028.

It is contended by respondent that the issuance of the garnishment was authorized under the Article 247 a, aided by the original attachment statute in the State.

As appears from the statement of facts, affidavit and bond for attachment was made and thereon writ of attachment issued, which was by the sheriff of El Paso County, Texas, returned "No property of defendant in said writ found in El Paso County, Texas." And based upon such affidavit and bond for attachment, Wells, through attorney, made the affidavit which appears as "Exhibit B" therein filed. (Printed Record 23) And thereon writ of garnishment directed to the Rio Grande, El Paso & Santa Fe Railway Company was served. Garnishee duly answered. (Printed Record 24-30).

While admitting in such answer an indebtedness to the original defendant in many thousands of dollars,

liability under the writ of garnishment was denied, all of the defenses being set up which were made the basis of the bill for injunction herein.

Afterwards, and on December 21, 1921, petitioner as the defendant in the suit instituted by Wells, having made default, and no appearance for it being entered in said suit, judgment was taken against it in the sum of Four Thousand Dollars and costs. It was further recited in this judgment that the plaintiff had sued out an attachment and had caused to be issued a writ of garnishment summoning the Rio Grande, El Paso & Santa Fe Railroad Company to answer as garnishee what, if anything, it was indebted to the defendant, and the garnishee having answered, showing that at time of service of said writ it was indebted to defendant in a sum far in excess of the amount of said judgment and costs, and had in its possession effects of defendant, it was adjudged that the recovery in favor of plaintiff against the Atchison, Topeka & Santa Fe Railway Company is only effective against it to the extent that same may be satisfied in proceedings against the garnishee, and that no execution issue on said judgment against said original defendant, save and so far as may be permitted or authorized by an order of the Court in said garnishment proceeding, the Court not having yet determined to what extent it will render judgment against the garnishee. (Printed Record 30).

Afterwards, and on January 24, 1922, the garnishment case was heard, all the defenses interposed by the garnishee were held for naught and garnishee was ad-

judged liable to the plaintiff for the amount of the judgment previously entered against the defendant, it having been determined by the Court that the garnishee had in its possession assets belonging to the defendant of far greater value than the amount of the recovery. (Printed Record 31-32).

So that by reason of the service of the writ of garnishment, the Court determined that there was jurisdiction over petitioner; that the amount of the damage was Four Thousand Dollars and that as garnishee had in its possession effects belonging to the defendant of greater value than the amount of judgment, recovery was awarded against it to the extent of the recovery in the original case, a personal judgment being rendered against the garnishee for the amount of the judgment awarded against this petitioner.

It appears, without controversy, that petitioner is a foreign railroad corporation doing no business in Texas, having no line of road in that State, that the cause of action against it arose in the State of New Mexico, that at the time of the accident the plaintiff was a citizen of the State of Colorado; that petitioner had and has more than sufficient assets in said State, as well as in the others through which it operates, to more than satisfy any demand that plaintiff could establish against it, there being Courts in each of said jurisdictions wherein redress could be obtained. That garnishee, Rio Grande, El Paso & Santa Fe Railroad Company owns and operates a line of road from El Paso to the boundary between the States of Texas and New Mexico where it connects

with the line of petitioner, the two forming a continuous line from El Paso to various stations on the line of petitioner in the numerous States through which it operates. That it is usual, and practically necessary, for freight charges on shipments originating on the line of petitioner to follow and be collected at El Paso, where same is the destination of shipment; that in the sale of tickets from El Paso to points on the line of petitioner, charge for the entire transit is collected at point of origin; that the cars and engines and other equipment of petitioner used on the line of the garnishee company were so used under contract between the two carriers, under which garnishee is entitled to the exclusive use and possession of same while so in its possession, and that it is necessary that the cars of petitioner containing shipments destined for El Paso should be run through to destination and that it is required to allow this to be done; that all of the funds impounded under the writ of garnishment represent the proportion due by the garnishee to petitioner, not only on interstate business, but solely for business done by petitioner entirely beyond the limits of the State of Texas; that none of same was earned or accrued to petitioner for anything done or performed within the State of Texas and that such funds are needed by it in the conduct of its business and in order to perform the service enjoined upon it by the laws of Congress, lawful rules of the Interstate Commerce Commission, as well as the laws of the various States through which it operates, and that the equipment of petitioner in the hands of the garnishee at the time the writ was served was equipment so likewise needed and

to be used by petitioner when the same should in due course of business be returned to it.

We want in this connection to especially emphasize the fact that none of the funds so impounded had situs within the State of Texas, and that all of same accrued to petitioner in the conduct of an interstate transportation business conducted as required by law, and all beyond the limits of the State of Texas.

The agreed statement of facts fully outlines the status of the relation between the two companies and the rights of petitioner to the funds in question. (Printed Record 35-42).

Respondent contended that the proceeding was justified by Article 247 A of the Texas Statute, and that having complied with that and the succeeding Article, jurisdiction was obtained under the writ of garnishment over petitioner to the extent of the funds impounded.

It is the rule of decision in Texas that the right to the process of garnishment will be strictly construed against plaintiff in the writ, and every intendment will be indulged in favor of the garnishee. Jameson v. Scarborough, 56 Tex. 358, and many other cases.

Starting with the premise that prior to the passage of the above Statute there was no right to the issuance of the writ of garnishment on an unliquidated demand, we say that the Statute in question does not authorize its issuance. Attachment and garnishment are not one and the same, and without a Statute authorizing, neither process can issue in any cause. By its terms this

Statute only permits the issuance of attachment and nowhere authorizes the process of garnishment. Bear in mind that under the writ of attachment in this proceeding no property was found. Whatever was obtained was under the writ of garnishment; in fact, a debt is not capable of manual seizure and therefore cannot be reached under attachment. C. R. I. & P. Ry. v. Sturm, 174 U. S. 715.

Believing as we do that the rule is universal that the right to the extraordinary process of garnishment is strictly construed, that nothing will be allowed by way of intendment in favor of the right, this statute clearly negatives an intent to authorize its issuance.

It will be presumed that the Legislature knew the state of the law in Texas at the time this act was passed, and that it had been held that the process of garnishment could not issue in aid of an action for damages, and this knowledge being charged to the Legislature and the act not directly authorizing its issuance on an unliquidated demand, we are warranted in assuming that the act expressed all that the Legislature intended by way of enlargement on the right to extraordinary process, and not only do we so assume, but as a matter of law, there was no enlargement as to the right of the process of garnishment. The fact that under the original garnishment Statute the writ might issue where it was made to appear that attachment, with affidavit and bond therefor had been made, cannot aid for the reason that under the original garnishment Statute the cause of action declared upon must be liquidated, and it is only where the demand is liquidated that the writ of

garnishment may issue by virtue of a previous affidavit and bond in attachment or garnishment. The Statute in question was and is only an enlargement of the right to the writ of attachment as same had previously existed, and under the circumstances made there to appear. So that we contend initially that the Statute itself negatives the right to the process used in this case to obtain jurisdiction over appellant.

SECOND: THE GARNISHMENT FIXED NO LIEN WHICH COULD BE ENFORCED AGAINST THE PROPERTY IMPOUNDED.

A review of Chapters 1 and 2, Title 11, Revised Statutes of the State of Texas, will, as we believe, lead to the conclusion that the service of the writ of attachment or garnishment only creates a lien which can be enforced in some of the methods pointed out in these chapters, AFTER a valid judgment has been obtained against the original defendant.

Under the heading "Attachments," Article 267 provides in effect that the execution of a writ of attachment creates a lien from the date of the levy on such personal property as remains in the hands of the attaching officer and the proceeds of such personal property as may have been sold.

Article 268 provides that should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens.

As to garnishments, Article 293 provides for a judgment against the garnishee for the amount admitted or found to be due, unless such amount shall exceed the

amount of plaintiff's judgment against the defendant, in which case it shall be for the amount of the judgment, interest and costs. Please note that this Article pre-supposes judgment against the original defendant.

Article 294 provides that where it appears from garnishee's answer that garnishee has effects of the defendant liable to execution, the Court shall render a decree requiring the garnishee to deliver up to the sheriff presenting an execution in favor of the plaintiff against the defendant, such effects or so much thereof as may be necessary to satisfy the execution.

In short, it definitely appears from these various provisions that under the Statutes of Texas plaintiff *must obtain a valid personal judgment against the original defendant* on which the lien may be foreclosed or under which, when an execution issues, property may be sold in some of the methods designated

As said above, the judgment entered in the garnishment proceeding always pre-supposes a valid judgment against the original defendant. The Supreme Court of Texas has in effect so held. Sun Mutual Insurance Company v. Seeligson, 59 Tex. 3. Kelly v. Gibbs, 84 Tex. 147. We quote from the Seeligson case:

> "It is true that there can be no valid judgment against a garnishee unless there be a judgment against the defendant, and for this reason garnishee is entitled to have an inquiry made as to whether or not, when a court has assumed to render a judgment against a defendant, it had jurisdiction over his person and over the subject matter of the suit, for if it had not, a judgment against the garnishee would be no protection to him.

"If, however, the Court had jurisdiction of the person of the defendant and of the subject matter of the suit, then the garnishee cannot be heard to question the conclusiveness of the judgment as between the plaintiff and the defendant, for the judgment against himself in such case will be full protection to him for any payment he may make under it. . . . . .

"The garnishee not only has the right to resist a judgment against himself until there is a valid judgment against his creditor or the person for whom he holds property, but he has the right and it is his duty to resist a judgment against himself until the Court has jurisdiction over him; otherwise any payment he might make would be a voluntary payment and the judgment would be no protection to him, for it would not be binding upon him if the Court which rendered it had no jurisdiction over him."

It may be that the Legislature could have provided, in case of a non-resident, for the rendition of a judgment against him to extent of the property impounded, this in the nature of a judgment in rem, but there is no such provision. The Legislature has not so provided, and as the Court may not legislate or exercise the function of a Legislature, neither may it supplement an act of the Legislature, and because of this we urge that the only legal effect, in any event, that may be given to Article 247 A, supra, is to hold that it creates a lien or impounds property to be held in legal custody until such time as plaintiff may secure a valid judgment against the defendant, and such a judgment can not be obtained in Texas against a corporation that is not doing business in the State. A. T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513.

And it occurs to us that unless this construction is placed upon the Article 247 A, it is directly in the face of Pennoyer v. Neff, 95 U. S. 714.

It may not be amiss in this connection to quote that case at page 728:

> "But the answer to this position has already been given in the statement that the jurisdiction of the Court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect can not be made to depend upon facts to be ascertained after it has tried the case and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the Court before it is rendered, not upon what may occur subsequently."

We may in this connection refer to Hochstadler v. Sam, 73 Tex. 315, in which it is held that where juris-

diction is sought by virtue of an attachment, if the attachment fails, there is no jurisdiction.

We must be mindful that, as a general proposition, petitioner is not subject to the jurisdiction of the courts in Texas, and therefore that no personal judgment can be entered against it in that State without a voluntary submission to jurisdiction.

The Article 247 A of the Statutes of that State must of course be construed in connection with the other Articles of Chapter 1, Title 11, Revised Statutes. And the only constitutional effect that can be given to this Article 247 a is to construe the same as fixing A LIEN UPON TANGIBLE PROPERTY LOCATED WITHIN THE STATE, AND TO MAKE THE PROCEEDING ONE IN REM ONLY, and when this construction is so placed there is the want of authority to foreclose the lien so fixed until there has been rendered a valid judgment against the original defendant.

Of course, the service by publication sought to be obtained against petitioner would not support a judgment and as the judgment rendered against this petitioner on such service was void, it certainly was not vitalized, nor the judgment entered more effective by reason of a subsequent judgment against the garnishee. The vitality of the judgment against the original defendant must of course be determined as of the time when it was entered and can not become more effective by reason of a subsequent proceeding against a garnishee. Again we quote from Pennoyer v. Neff. At page 727 it is stated:

"In other words, such service may answer

> in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State can not run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligations upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

So that as there is no Statute in Texas authorizing as against a non-resident, judgment against him to the extent of property impounded and as the courts may not import into a Statute any additions thereto, the conclusion would seem to be forced that in the present proceeding there could be no valid judgment rendered against the garnishee until a proper judgmeat had been entered against the original defendant.

It has been held that the original defendant is not required to take notice of a garnishment proceeding and is not concluded by the judgment entered therein. Mo. Pac. Ry. Co. v. Whipser, 77 Texas 16.

Not only so, but every intendment should be indulged in favor of the absent defendant and Statutes which seek to subject him to the jurisdiction of a foreign court are never liberally construed. As indicating the modern trend we quote from Missouri Pacific Ry. Co. v.

Clarendon Boat Oar Co., 42 Sup. Ct. Rep. 211, wherein Chief Justice Taft used this language:

> "Provisions for making foreign corporations subject to service in the State is a matter of Legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. Indeed, so clear is this that in dealing with Statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State."

And, as such, then, is what is therein designated the "leaning" of the Court as to foreign corporations doing business in a State, how much stronger would be this leaning as applied to foreign corporations who have been adjudged non responsive to litigation within the State.

We therefore urge that, in the circumstances, to enforce the judgment complained of would be as to petitioner a denial of the equal protection of the law, and the effect will be to deprive it of its property without due process of law.

The questions at issue have been discussed, having reference solely to the local law. There is, as we believe, the larger questions involved as to the rights of petitioner accruing to it under the Constitution of the

United States and laws enacted thereunder, as well as duties enjoined which have been by the proceedings, here complained of, invaded. These questions as they seem to arise are:

FIRST: ENFORCEMENT OF THE JUDGMENT ENTERED IN THE STATE COURT AGAINST PETITIONER WILL BE, IN VIEW OF ALL THE CIRCUMSTANCES, CONTRARY TO THE COMMERCE CLAUSE OF THE CONSTITUTION, OF THE INTERSTATE COMMERCE ACT, AND THE TRANSPORTATION ACT OF 1920.

Initially we suggest that the Circuit Court of Appeals was inaccurate in its statement to the effect "In Texas the railway company was engaged only in interstate commerce." Admittedly, as a fact, it was not engaged in any character of business in Texas, nor, as a matter of law was it so engaged. The Circuit Court of Appeals in A. T. & S. F. Ry. Co. v. Weeks, 254 Fed 513, so held, and a petition for certiorari in that case was by this Court denied. (249 U. S. 602). It is admitted that unaided by the extraordinary writs of attachment or garnishment no jurisdiction in causes of action such as was here declared upon can be obtained over petitioner in Texas. We have contended, supra, that even under the local law petitioner could not be so subjected even aided by such process, but passing to the greater question as embodied in the proposition above asserted, what is the status? We shall not set out verbatim either the applicable portions of the Act to Regulate Commerce, 40 Stat.—L. 101, or the Transportation Act of 1920. Section 402, 41 Stat.—L. 476, but shall present a general resume.

An analysis of the Act to Regulate Commerce, as amended (Paragraph 4, Section 1), makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable division of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6, Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when

of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service without regard to ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality or any particular description of traffic to any unreasonable prejudice or disadvantage whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

It appears from the facts that for many years it has been and is now the custom and practice of carriers to allow their freight charges to follow the shipment,

so that the delivering line collects the entire freight charge for all carriers over whose lines the shipment is moved, the delivering carrier accounting to the other lines for their proportion of freight collected; that it has been and is customary, in order to serve the convenience of passengers, for the initial line to sell tickets good for transportation over connecting lines and to collect from passengers the entire charge and account to the other lines for their proportion thereof; that there is a very large commerce originating at, destined to and passing through El Paso; that the cars and engines and other railroad equipment belonging to petitioner and in the possession of garnishee were so in its possession under a contract between petitioner and garnishee, under which garnishee was entitled to the exclusive use and possession thereof while needed on its line of road, and that same would have been needed and used by petitioner in the conduct of its business as an interstate carrier when returned by garnishee to it; that the moneys impounded under the writ of garnishment are for services, not only rendered entirely beyond the limits of the State of Texas, but also same are needed and would have been used by petitioner in the conduct of its business as a common carrier, and as required by law.

In other words, it definitely appears that the cars, engines and railroad equipment, as well as moneys impounded under the writ of garnishment, were each and all instrumentalities necessary for the use of petitioner in the conduct of its business as a common carrier. Can these instrumentalities be interferred with

or interrupted by reason of a local Statute? That such has been the effect in this case may not be denied.

Plainly, under the provision of the Interstate Commerce Act the petitioner cannot except El Paso from the custom outlined without violating the provisions of such Act, for to do so would subject El Paso to undue prejudice and disadvantage. The acts regulating commerce contemplate free interchange of cars and engines between connecting lines of railroad and the use by one of the cars and engines of the other, it evidently being the view of Congress that such will promote the handling of interstate traffic. It was evidently also the view of Congress that the practice of the charges following the freight and the sale of through tickets should continue, as carriers are required to establish through routes and such practices are reasonably necessary for practical operation. Under such circumstances is it due process of law for a State to provide for the attachment of such equipment or the garnishment of funds so arising in cases on foreign causes of action in which the citizens of the particular State are in no way interested? Can the State impose such a penalty on the carrier for complying with the acts of Congress? Aside from the question of due process of law, is not such action or attempted action by a State an interference with and an impediment to interstate commerce? The necessary tendency of such attempted action is to deter carriers engaged in interstate commerce from carrying out the policy of Congress with respect to through routes and through traffic and the interchange of engines and cars.

It has often been decided that the right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive powers. We contend that by reason of the amendment to the Interstate Commerce Act, as well as the Transportation Act of 1920, this exclusive power as to the subjects of this litigation has been manifested, and that thereby the same has been removed from the sphere of State action and that therefore the State has not the power to interfere with or impede the continuity of interstate transportation, and that such has been the effect of the uses to which a local Statute has been applied in the instant case can not be doubted.

We shall not quote, extensively, authorities in support of the proposition above asserted, but refer to Southern Railroad Co. v. Railroad Commission, 236 U. S. 447, holding that local Statute requiring railroads to place grab irons on cars is superseded by the Federal Safety Appliance Act. Erie Railroad v. New York 233 U. S 681, holding the labor law of New York relating to hours of service of telegraph operators void as conflicting with Federal Hours of Service Act. Mo. Pac Railroad v. Washington, 222 U. S. 370, holding hours of service act ineffective because in conflict with the Federal Act. McDermott v. Wisconsin, 228 U. S. 132, holding the Wisconsin act relating to labeling syrups void as conflicting with Federal Food & Drug Act. Adams Express Co. v. Croninger, 226 U. S. 506,

holding the Carmack Amendment supersedes State regulations on the same subject. Mondou v. Railroad Company, 223 U. S. 55, holding the Federal Employers' Liability Act exclusive. Louisville & Nashville R. R. v. Hughes, 231 Federal 739, holding Ohio Act for extension of equipment of locomotive boilers superseded by Federal Act.

So that there being no doubt as to the general rule, let's see the application. In the Interstate Commerce Act, prior to the recent amendment, nothing was undertaken in behalf of the Federal Government relative to cars or car service, except to include them under the general definition of transportation in the first section, but under the amendment of 1917, it is provided:

> "The term car service as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation by any carrier, subject to the provisions of this Act."

Just rules and regulations are provided for. Penalties prescribed for violation.

The same subject was treated in the Transportation Act of 1920. Definitions of the Interstate Commerce Act were retained, and car service defined as including the use and return of locomotives, cars and other vehicles, plainly indicating that the return of empty cars is a part of car service over which Congress gave the Interstate Commerce Commission the widest jurisdiction.

It also gave jurisdiction for the use of terminal facilities, etc., and because of the assumption by Con-

gress of the controls enumerated, State power thereover ceased, and herein lies the distinction as to the rights of petitioner and those considered by this Court in Davis v. C. C. C. & St. L. Railroad Co., 217 U. S. 157, so much relied upon by respondents.

We have undertaken to point out the difference in the state of the law at the time the Davis case was decided (1910) and at the present time. Mr. Justice McKenna necessarily considered the subject, having in mind the Interstate Commerce Act as it then stood. The inference is quite strong, however, as he several times referred in the opinion to Congress and its power in the premises, that it was not the intention to hold that if Congress had assumed control of the entire field of interstate transportation that the Iowa Statute there under discussion would be effective, and no contention could have been made in that case by the Railroad Company that the laws of the State interfered with interstate commerce, nor that they were directly contrary to the Acts of Congress. It is further said in the opinion that Congress had not intended, by the Interstate Commerce Act, to abrogate the attachment laws of the States, and possibly in the state of the law as it existed at that time, there was no inference that the laws of a State regulating commerce interrupted or violated any provision of a Federal act. But, this can not be true now.

A reading of the Interstate Commerce Act, as well as the Transportation Act of 1920, must lead to the conclusion that Congress has assumed control of the entire field of interstate commerce, including each and

all of the instrumentalities thereof; otherwise, a carrier could not comply with these acts. If, in the face of the requirements thereof the means of complying therewith may be regulated, impeded or interrupted by the local laws of each State, then the carriers will indeed be in a helpless condition, subjected upon the one hand to a penalty for their failure to conduct transportation as required by Congress, and to be practically enjoined from so doing by the police regulations of each State.

The highest obligation of the carrier is to the public. This is the keynote to the Acts of Congress, and we are not at all sure but what by reason of these acts the instrumentalities needed in the conduct of that business have been put away in a kind of a civil sanctuary.

The requirements of the Federal Act are imperative. Service is required. Exchange of equipment is required. The rates prescribed by the Interstate Commerce Commission have for their purpose primarily the gathering of funds sufficient to enable the carriers to perform the service required, and if, by garnishment process in a foreign jurisdiction on a cause of action arising elsewhere, these funds may be diverted under a local Statute, the continuity of service will be to that extent interrupted.

It must be noted that Mr. Justice McKenna in the Davis case was careful to limit the effect of the decision to the facts there appearing, and necessarily to the law as it then existed. There has been great advance in the solution of the various railroad problems that

have been troublous during the past few years. The demands of the public for uninterrupted and prompt service; yes, the growing demand therefor was the moving spirit behind the Amendments to the Acts of Congress regulating carriers. The thirteen years intervening since the pronouncement of Mr. Justice McKenna as above, have been wrought with changes more rapid and drastic in the control of the transportation of this country than ever before, or that our forefathers ever dreamed would be taken, and as a result of which every activity of an interstate carrier is under control of some law or the regulation of the Interstate Commerce Commission.

It would seem that no phase of the subject has been left untouched, and as Congress stepped in, and by each successive act assumed greater control, the power of the States receded relatively.

There is no longer, insofar as this subject goes, such a thing as dual control, Congress in effect having said to the carriers:

> "The Federal Government will hereafter regulate all of your activities from the moment a pound of freight to be transported interstate is received, until the car containing the same has been returned to its home terminal. Your power to borrow money for the conduct of your business will be controlled. The issuance of your securities shall be regulated. The wages of your employes will be fixed."

Indeed, this control is so complete that even the right to build new or additional lines is regulated. And, having so entirely surrounded the carrier, even

to say that a State may by local Statute seize any of these instrumentalities on a cause of action sounding in tort in a State wherein a particular carrier is not doing business, is inconceivable; and a local law which so authorizes would appear to be so plainly violative of the control of the carrier, and its activities, as evidenced by the Acts of Congress, that no argument should be deemed necessary. And yet, such is not only the theory but the effect of what is sought in the action instituted by Wells.

It would seem to be plain, in view of what Congress has said, that the State is deprived of the right to interfere with the handling or distribution of cars, or to issue any process which would impede regular and orderly interstate transportation or deprive the carrier of funds necessary for that purpose, and not only so, but it is the policy of the law to keep lines of transportation open and to require continuous transit between connecting carriers, as well as interchange of cars, in the interest of the general public, and these needs may not be interfered with by the State; and that this has been the uniform tendency for many years, we have only to cite St. L. & S. W. Railroad v. Arkansas, 217 U. S. 136, wherein a State Statute, which undertook to control a Railroad Company to distribute cars in a particular manner and as per an order issued by the Railroad Commission of the State, was held to impose a burden on interstate commerce, and was unconstitutional under the commerce clause of the Constitution.

It thus appears that the entire field of interstate transportation has been fully occupied by Congress, and that its regulations are, as to the carrier, so complete and conclusive as to exclude from all consideration State control or interference therewith, and because of which any construction of the Texas Statute so as to authorize thereunder the seizure by attachment of cars and engines of petitioner while in the possession of connecting carrier or as authorizing the seizure by a writ of garnishment of moneys due or to become due petitioner by garnishee, for freight and passenger charges for account of petitioner, same having been collected by garnishee as the delivering transportation line, will necessarily impede and obstruct this petitioner in the performance of the duties imposed upon it under the Act to Regulate Commerce, and not only so, but that same will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and enjoined upon the carrier.

Not only are the acts regulating commerce materially different from what they were when Davis v. C. C. C. & St. L. R. R. Co., 217 U. S. 157, was decided, but it was not made to appear there, as it does here, that the result of sustaining the garnishment proceeding would be to cause a flood of foreign litigation, hereinafter discussed, to the detriment of the carriers engaged in interstate commerce, and of such commerce; on the contrary, the Davis case was an isolated case, and the Court was careful to confine its decision to the particular case.

This Court has very recently determined the question at issue. We refer to the case of Davis v. Farmers Co-operative Equity Company, reported in the issue of June 15, 1923, of the U. S. Supreme Court advance opinions, case having been decided May 21, 1923. There the Court had under consideration the effect of a Minnesota statute which provided that any foreign corporation having an agent in that State for the solicitation of freight and passenger traffic over its lines outside of the State might be served with summons by delivering a copy thereof to such agent. The suit was against the Director General of Railroads on a cause of action growing out of a shipment from one point to another in the State of Kansas. Defendant in the action attacked the jurisdiction which was sought to be maintained in the State of Minnesota, on the ground that the Minnesota statute violated the due process, equal protection and commerce clauses of the constitution. It is pointed out in the opinion which was delivered by Mr. Justice Brandeis that jurisdiction under that statute was not limited to causes arising out of business transacted within Minnesota and among other things the Court said:

> "This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause."

And again, this pertinent language is used:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the

> transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use. See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case (Akron C. & Y. R. Co. v. United States) 260 U. S.—, ante 308, 43 Sup. Ct. Rep. 270.

The case at bar comes squarely within the view of that statement. Here, as there, the railroad is a foreign carrier, sued in a State in which the cause of action did not arise, in which it neither owns nor operates a railroad and in which the plaintiff does not reside. In other words, we have brought ourselves strictly within the scope of that opinion. There can be no difference in principle between two statutes, the one undertaking to confer jurisdiction where the railroad has a soliciting agent in a foreign jurisdiction and the other in conferring jurisdiction in such foreign State by the process of garnishment. The burden on interstate commerce and the violation of the commerce clause of the constitution would be and is just as much pronounced in the latter as in the former and the reason for non-liability in the latter jurisdiction is just as great as in the former, so that we express the hope that the Court's conclusion will be the same. This Court has in many cases upheld the contention that the States may not burden interstate

commerce. We have in this connection only to refer to Western Union Telegraph Company against Kansas, 216 U. S. at page 26 where it is said:

> "This Court has guarded with both diligence and firmness the freedom of interstate commerce against hostile State or local action, as such action has been manifested by regulations operating in some instances directly, in others indirectly, upon the means or instruments employed in that commerce."

And again in the same case at page 27 the Court said:

> "But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce can not conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

And to like effect was Sioux Remedy Co. v. Cope, 235 U. S. 197. The Texas Statute as applied in this case burdens interstate commerce and hampers the carrier in the performance of duties imposed by Federal law.

And if the Texas Statute is so construed, petitioner will be deprived of its properties and rights without due process of law. As for instance, while requiring petitioner by the Act to Regulate Commerce, to permit its cars and engines to run into Texas, and to permit garnishee to collect its freight and passenger charges, which it must do, to then further require petitioner to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other States on causes originating in other States and having no relation whatever to any traffic or transportation to or from El Paso, or to any business or things, is not due process of law; but, this is the identical result if the Texas Statute under consideration may be enforced in the circumstances as are herein presented.

The precise question under identical facts was before the District Court, second judicial district, State of Minnesota, in the case of John D. Meeks against this appellant as deffendant and other rail lines as garnishees, and in an opinion rendered in October Judge Sanborn held, following Davis against Farmers Co-operative Equity Company, supra, that traffic balances were not subject to the process of garnishment in an action against a foreign rail line and could not be used for jurisdictional purposes. In other words, that the process of garnishment could not be used as a means

of accomplishing indirectly what this Court in the Farmers Co-operative case held could not be done directly.

We attach hereto as an appendix the judgment of the Court in that case, together with the opinion above referred to. Same is not, of course, binding upon this Court but is instructive and, as we believe, quite persuasive.

Again, and having reference to the cars, engines and other equipment in the possession of the garnishee and of these instrumentalities came to the garnishee under a contract between it and petitioner, under the terms of which contract garnishee was entitled to the use of this equipment in the conduct of its business. Now, may this contract be interfered with, as has been the effect of the garnishment proceedings? We say, No. And in this we are supported by the Supreme Court of Massachusetts. In Koontz v. B. & O. Railroad, 107 N. E., 973, a proceeding similar to this was instituted, prior, however, to the Amendment of the Interstate Commerce Act and the passage of the Transportation Act of 1920. It appeared in that case that the New York, New Haven and Hartford Railroad Company had certain cars in its possession belonging to the B. & O. Railroad which were attached. It was shown that the Trustee received the cars under an arrangement or agreement with the other line, which gave it the right to dispatch them to the place of destination on its own line instead of transferring the freight on its own cars. It was permitted to use the empty cars for carrying freight on its own road,

eac. And after referring to the Davis case the Court said·

> "The cars thus became, for the time being, a part of its equipment and compensation therefor ceased when they passed out of the Trustee's possession and control."

Under this state of fact the Court said:

> "If the Trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. Brown v. Floersheim Mercantile Co., 206 Mass 373, 376, 92 N. E. 494. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. R. L. c 189, pp. 57-65. Cornell v. Mahoney, 190 Mass. 295, 296; 76 N. E. 664; Thompson v. King, 173 Mass., 439; 53 N. E. 910. The bailment can not be said to be violative of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service, and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trustee ought not to be subjected to the expense of unloading, and re-distribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if having been emptied they were collected and retained unused to await the result of litigation. Van Camp Hardware Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Cox v. Central Vermont R. R., 187 Mass. 609, 73 N. E. 775. The Trustee not being chargeable, it becomes unnecessary to determine whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of R. L. c

167 p. 39, relating to the attachment of railroad cars in actual use making regular passages. The order of dismissal is affirmed and the motion of the trustee to be discharged is granted."

We presume that the arrangement there was similar to the one existing in the case at bar.

SECOND: THE WRIT OF ATTACHMENT OR GARNISHMENT MAY NOT BE USED AS A MEANS TO COMPEL A SOLVENT DEFENDANT TO LITIGATE IN A FOREIGN JURISDICTION.

It is admitted that the cause of action arose in the State of New Mexico, at which time Wells was a resident of the State of Colorado; that his claim was an unliquidated demand; that there are in the States of Colorado and New Mexico courts wherein he might assert any cause of action he may have against petitioner, and that petitioner is financially able to respond to any judgment which he might recover against it; that it has in the States of New Mexico and Colorado, as well as other States through which it operates, property subject to execution of value many thousand times greater than any liability which might be found to exist against it on any cause to be so asserted. (Printed Record 36).

That in said cause so to be asserted, the witnesses in behalf of the Railroad Company, material to its defense, are employes whose attendance would be necessary and during which attendance they would be required to absent themselves from their usual and customary labors and the Railroad Company would be deprived of their

services from such ordinary and customary labors during the time of their attendance upon the Court, for which attendance the Railroad Company would be required to pay their expenses and compensation for loss of time; that said witnesses reside in San Marcial, New Mexico, about one hundred and fifty miles from El Paso (Printed Record 38).

That petitioner operates lines of railroad through many counties in New Mexico, including the County of Socorro where plaintiff claims to have been injured, and in which county it has agents upon whom process could be served, as well as courts having jurisdiction of his cause of action (Printed Record 38-39).

That for many years prior to the entry of the final decree in the case of petitioner against J. F. Weeks, et al., No. 109 in Equity on the docket of the District Court of the United States, Western District of Texas, it had been the practice of attorneys residing in El Paso to institute suit against petitioner in the courts of El Paso county, Texas, for injuries occurring to persons in the States of Illinois, Kansas, Colorado, New Mexico; Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that there had been filed prior to the time plaintiff exhibited its bill in the Weeks case and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State courts of El Paso County, Texas, for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases, in order to prevent default

it was necessary for petitioner to defend in said causes, and it so defended said causes by bringing numerous employes from their regular work in such other States to El Paso to testify, and during the absence of said employe witnesses from their regular work, substitutes were employed at expense to perform the services of said employes; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State courts of El Paso County, Texas, against petitioner until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against petitioner been instituted in any State through which petitioner operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought. (Printed Record 42).

And under this state of facts, we contend that this is not a bona fide cause in which plaintiff undertook to subject the property of petitioner to the payment of the asserted claim so made in a foreign jurisdiction, but rather that same is an effort to compel this petitioner to come into Texas to defend a personal injury suit. We quote again from Pennoyer v. Neff, 95 U. S., beginning on page 723:

> "So the State through its tribunals may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens, and when

> non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-residents' obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate."

It is not pretended that this is an effort to subject the property of the Railroad Company to satisfy *any claim of a citizen of Texas against it.* Wells was not such a citizen, but it appears to us to be a rather bold-faced effort to import litigation into Texas, and to force the Railroad Company to appear in that State to defend an action against it which is really in personae. Again we quote from Pennoyer v. Neff, wherein the Court cites the following from Boswell's Lessee v Otis, 9 Howard 336, as follows:

> "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

The Court in Pennoyer v. Neff at page 734 also used this language:

> "It is true, that in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

It is therefore submitted that under the record, as well as the history of the many cases formerly imported into El Paso, this can not be and is not substantially a proceeding in rem: that there was no direct purpose to reach and dispose of any property owned by petitioner in Texas. But as before said, that such procedure was adopted merely and only for the avowed purpose of securing a really unfair advantage. It seems perfectly plain that both Wells and his attorneys knew that it was not necessary to either attach or garnishee any property of petitioner in order to save to them an alleged debt. We again quote from Pennoyer v. Neff, pages 730 and 731:

> "As was stated in a subsequent case, the doctrine of this court is that the act 'was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its results, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.' The Lafayette Insurance Company v. French et al, 18 How. 404.
>
> "In all the cases brought in the State and Federal courts where attempts have been made under the act of Congress to give effect in one

> State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force except as to property, or interest in property within the State to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

The real and only just purpose and object to be obtained under the writ of foreign attachment is to secure a claim that can be secured in no other way. A reading of the entire opinion in Pennover v Neff as well as other cases, would seem to be convincing that such is the real office of the writ and the use thereof never justified where the defendant has assets at the place of residence of either himself or the claimant more than sufficient to satisfy any judgment that may be asserted, and we here and now attack the good faith of any proceeding wherein it appears that at the place where the accident

arose, as well as at the place where the claimant resides, the defendant had assets of far greater value than any amount to be claimed, which could be reached in an orderly way under process regularly issued, and yet, such claimant declines to proceed as by law authorized in such cases, but hies himself to a foreign jurisdiction where neither he nor defendant has a domicile, and undertakes to tie up, by extraordinary writ, property of the defendant, which is being used in an orderly way and in the conduct of a business that is essential not only to the well being and happiness, but to the real necessity of the public at large, and to permit such claimant, in these circumstances, to so clog the wheels of commerce and interfere with the orderly process of interstate transportation and tie up its instrumentalities is under the circumstances wholly indefensible. And. to construe a State Statute as authorizing such a procedure would and will be to a railroad company, whose property is thus impounded, lacking in due process of law, a denial to it of the equal protection of the laws, and a burden upon interstate commerce.

It's worse than folly to contend, under the admitted facts, that it was the intention of the plaintiff in the original action to institute a proceeding in rem. This must address itself to the judicial mind, and unless the real object of that proceeding was one in rem, the entire effort should fail. Under such circumstances, every doubt should be resolved against the regularity and good faith of the proceeding. In this connection we can do

no better than quote what was said by the Circuit Court of Appeals in A. T. & S. F. v. Weeks supra. We quote the closing paragraph:

> "When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to the railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the State of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the State can more satisfactorily administer the laws of the State than can the courts of any other State. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a State of the expense of maintaining courts to try causes in which the State has no interest would be difficult to justify The maintenance of the judicial machinery involves no light burden. Many of the States, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other States. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal."

If the position taken there was sound, the situation

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presented by this bill would make its application more obvious than then appeared. The property of a railroad company has a fixed situs and may be readily reached. And again we say that the real object of the suit instituted by Wells, as seems to be plainly indicated from the statement of facts, is and was to force this Railway Company to litigate personal actions in Texas, and that the assumed proceeding in rem was not only more fanciful than real, but there was no excuse for its attempted exercise.

It appears from the statement of facts that many suits have been imported into El Paso which necessarily burdened the defendants and interrupted the service, and as applicable to that situation we again quote from Davis v. Farmers Co-operative Equity Co.:

> "That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation; and that this impairs efficiency in operation and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious. During Federal control absences of employes incident to such litigation were found by the Director General to interfere so much

> with the physical operation of the railroads that he issued General Order No. 18 (and 18 A), which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in Alabama & V. R. Co. v. Journey, 257 U. S. 111, 66 L. ed. 154, 42 Sup. Ct. Rep. 6. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

And the following from the same case:

> "Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The rule of comity will not, of course, be so extended as that its application will burden interstate commerce or deprive the litigant of any right to which it is entitled under the constitution. It is not conceivable that a solvent, going concern that has a fixed place of abode known of all men, with properties subject to execution at given places, and likewise known of all men, may be yanked at the will or caprice of a claimant into a jurisdiction where neither of them has a residence, by the use of the process of garnishment or attachment. Such writs, in our judgment, are never allowable when ordinary process will suffice.

It occurs to us that the circumstances, as made to appear in this case, justify the Court in extending every doubt in favor of petitioner. And, we think the ques-

tion may well be asked: Why the extreme effort to bring actions of this kind in El Paso County, Texas? Are there not many courts of competent jurisdiction within each of the States that have admitted jurisdiction over the Santa Fe Railway Company, wherein causes of action against it may be heard? Is it not entirely solvent and able to respond to any demand that a litigant shall reduce to judgment within any of those jurisdictions? Did this cause of action arise within the State of Texas? Was not the service in which plaintiff was unfortunately injured performed in some other jurisdiction than Texas? Why, then, we again ask, assuming that the answers to each of these questions may be readily given, is there the untiring effort to import this litigation into Texas?

It would seem that the Court is justified in examining each of the propositions we have submitted and that this will enable the Court to apply the law regulating interstate transportation companies under the various provisions of the constitution of the United States under which such companies have their being, and whereby a decree may be entered that will give to this petitioner the protection it deserves and at the same time will be just and fair to respondent; holding, as you must, that Wells had no inherent right to institute his suit in Texas and that it is only by reason of what may be called a fiction that gives him any character of standing in the courts of Texas, and because of this petitioner is undoubtedly entitled to that leaning referred to by Chief Justice Taft in the Clarendon Boat Oar case. It is, of course, the duty of the Court in construing any

statute, not only to consider the plain import of the words used, but likewise the effect of the construction placed, having in mind the object sought. If the cause asserted by Wells can be maintained in Texas under the facts appearing, then action could be maintained in that State against the Boston & Maine Railroad at any place therein where a traffic balance in favor of the Boston & Maine may be found, even though such traffic balance due to the Boston & Maine might be in the hands of a Texas carrier without its knowledge. In other words, practically expressed, a suit for personal injuries could in these circumstances be filed in Texas against any railroad in the United States by the simple method of running a garnishment on a Texas line and tying up the traffic balance of the defendant railroad, and surely it will not be contended that such a construction will accord with the requirements of the Interstate Commerce Act, the Transportation Act of 1920, or the protective provisions of the Constitution of the United States, and on the above our cause is respectfully submitted

J. W. TERRY,

A. H. CULWELL,

Attorneys for Petitioner Appellant.

GARDINER LATHROP,

Of Counsel.

APPENDIX

STATE OF MINNESOTA,
COUNTY OF RAMSEY. DISTRICT COURT,
SECOND JUDICIAL DISTRICT

JOHN D. MEEKS,
Plaintiff,

vs. No. 153273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant,

and

Chicago, St. Paul, Minneapolis & Omaha Railway Company, Chicago Great Western Railroad Company, Minneapolis & St. Louis Railroad Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, Burlington & Quincy Railroad Company and Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Garnishee Defendants.

This cause came on to be heard on the 8th day of October, in Chambers, upon the motions of the defendant and the garnishee defendants to dissolve and dismiss the garnishment proceedings herein, to discharge the garnishees and each of them, to quash and vacate the garnishment summons herein, the service thereof and also the summons herein and the service thereof and all proceedings subsequent thereto. Barton & Kamuchey appeared for the plaintiff, and Sanborn,

Graves & Ordway appeared for the defendant and the garnishee defendants.

After hearing the arguments of counsel, and upon due consideration, it is

ORDERED that the motions of the defendant and the garnishee defendants be and the same are hereby in all things granted, that the garnishees be discharged. the garnishee summons herein vacated, together with the service thereof, and the summons herein and the service thereof upon the defendant discharged, together with all subsequent proceedings.

Dated October _____ 1923.

MEMORANDUM

The plaintiff is a resident of Kansas. The defendant is a foreign corporation organized under the laws of that state, a common carrier of freight and passengers, having no line of railway in this state and doing no business here, except to solicit traffic in interstate commerce. Its lines extend from Chicago westward through states other than this to California.

In December, 1922, the plaintiff commenced an action in Freeborn County, in the Tenth Judicial District, against the defendant for personal injuries, on a cause of action which arose in the state of Kansas and which did not grow out of any transaction entered upon within the state of Minnesota, service of process being made upon an agent for the solicitation of traffic, pursuant to Section 7735. Gen. Stat. 1913.

Thereafter, in February, 1923, an action was commenced by the same plaintiff against the same de-

fendant upon the same cause of action, by the same attorneys, in Scott County, in the Eighth Judicial District, service being made in the same manner. The latter action came on for trial, and the plaintiff had a verdict.

Upon the coming down of the decision of the United States Supreme Court in the case of *James G. Davis Director General of Railroads, vs. Farmers' Cooperative Equity Company*, reported in 43 Sup. Ct. Rep. at p. 586, holding that Sec. 7735 Gen. Stat. 1913, was unconstitutional, the defendant made a motion to set aside this verdict, which motion was granted on September 5, 1923. On October 4, 1923, the plaintiff appealed from the order setting aside the verdict, to the Supreme Court of the state of Minnesota, which appeal is now pending.

This action was then commenced by publication of summons, after garnishment of traffic balances arising out of interstate commerce and representing the amount due to the defendant from the garnishee railways out of various transactions connected with such commerce.

The principal contention of the defendant is that the statutes of this state relating to garnishment, being Sections 7737, 7738 and 7859 to 7887 Gen. Stat. 1913, if construed so as to permit the courts to acquire jurisdiction of an action such as this, are unconstitutional because in conflict with Art. 1, Sec. 8, Subdiv. 3 (the interstate commerce clause of the Constitution of the United States) in that they impose a serious and unreasonable burden upon interstate commerce.

Unless the case of *Davis vs. Farmers' Cooperative Equity Company*, referred to above, is controlling, the position of the defendant cannot be sustained. In this state the case of *Starkey vs. CCC&St.L. Ry. Co.*, 114 Minn. 27, is authority for the proposition that jurisdiction can be acquired by garnishment of traffic balances and that subjecting a fund consisting of such balances arising from interstate business to the payment of an indebtedness is not of itself an interference with interstate commerce. Under this decision and the other decisions cited therein, the only limitation upon garnishment in these cases is that it cannot be applied to a garnishee debtor temporarily within the state, this being held in *McKinney vs. Mills*, 80 Minn. 478, in which case the plaintiff, the defendant and the garnishees were all non-residents, none of them being in the state except the garnishee, who was served with summons while within the borders temporarily.

The case of *Davis vs. CCC&St.L. Ry. Co.*, 217 U. S. 157, directly holds that cars owned by a foreign railway Company temporarily in the state in the course of interstate transportation through the agency of other carriers are subject to attachment under state laws, and that sums due to such a carrier from other carriers may be garnished under state laws. Another case holding that jurisdiction may be properly acquired in this way is *AT&SF v. Wells*, 285 Fed. 269.

The important question, therefore, is whether the Supreme Court of the United States has either expressly, of by necessary implications, by its decision in the case of *Davis vs. Farmers' Cooperative Equity Company* held

that in such actions as this one jurisdiction cannot be so acquired. If it has, the motion of the defendant should be granted; if it has not, the motion should be denied.

The conclusion that the Court reaches in that case is that Sec. 7735 Gen. Stat. 1913, which provides that:

> "Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic, or either thereof, over its lines outside of this state may be served with summons by delivering a copy thereof to such agent."

violates the federal constitution, because in violation of the commerce clause thereof. It was contended in that case that the statute was not only void for that reason but because it violated the due process and equal protection clauses of the 14th amendment. The Court says this in support of its conclusion:

> "Solicitation of traffic by railroads in states remote from their lines is a recognized part of the business of interstate transportation. As construed by the highest court of Minnesota, this statute compels every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state. Jurisdiction is not limited to suits arising out of business transacted within Minnesota. It is asserted whatever the nature of the cause of action, wherever it may have arisen and although the plaintiff is not and never has been a resident of the state. This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause.
>
> "That the claims against interstate carriers

for personal injuries and for loss and damage of freight are numerous, that the amounts demanded are large, that in many cases carriers deem is imperative or advisable to leave the determination of their liability to the courts, *that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation and that this impairs efficiency in operation and causes directly and indirectly heavy expense to the carriers—these are matters of common knowledge.* Facts of which we also take judicial notice indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one and that the resulting obstruction to commerce must be serious. During federal control absences of employes incident to such litigation were found by the Director General to interfere so much with the physical operation of the railroads that he issued general order No. 18, (and 18-a) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & V. R. Co. vs. Journey*, 257 U. S. 111; 66 L. Ed. 154; rw Supt. Ct. Rep. 6. *"The facts recited in the order to justify its issue are of general application in time of peace as well as war."*

The Court then goes on to say, that the fact that the business carried on by a corporation is entirely interstate does not render the corporation immune from the ordinary process of the courts of the state and that the requirements of orderly, effective administration of justice are paramount. It then states:

"It may be that a statute like that here assailed would be valid although applied to

> suits in which the cause of action arose elsewhere, *if the transaction out of which it arose had been entered upon within the state* or if the plaintiff was, when it arose, a resident of *the state*. These questions are not before us and we express no opinion upon them. *But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside.* The public and the carriers are alike interested in maintaining adequate uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on the property devoted to the public use. *Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public.* With these ends the Minnesota statute as here applied unduly interferes, by requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The Court then points out that certain cases theretofore decided by it resemble the case at bar; that in two of such cases the validity of similar statutes was sustained as against the objection that they were in violation of the due process clause, but that since the Minnesota statute is held to be in violation of the commerce clause, the Court has no occasion to consider whether it also violates the 14th amendment.

It is perfectly clear that under this decision an ac-

tion such as the plaintiff brings cannot be maintained where service is secured merely upon a soliciting freight agent of the defendant, although the Supreme Court does not say that such service would not be due process of law. In other words, assuming that the Court would otherwise have jurisdiction, it has no jurisdiction in the presence of the commerce clause.

Can an action which cannot be brought by service in accordance with Sec. 7735 as an action *in personam* be converted by garnishment of traffic balances to a proceding *in rem* and thus confer upon the courts of Minnesota jurisdiction which they could not acquire in the other way? The Davis v. Farmers Equity case refers to conditions which have arisen from the operation of Sec. 7735, and which have become burdensome and obnoxious.

The practice in the state in the past so far as cases such as this are concerned has been to serve on the soliciting agent. The number of cases that has been brought by garnishment of traffic balances is of course inconsequential. It is apparent, however, if jurisdiction can be obtained in this way, that exactly the same class of lawsuits which the Supreme Court of the United States refers to will be brought here by this method. It is possible that the roads affected could avoid this by changing their manner of doing business and having no traffic balances in the state. It is difficult, however, to see why that should change the question of law or why a proceeding *in rem* should be any different from a proceeding *in personam*, except that it is if

anything more cumbersome and burdensome to all parties concerned.

If the requirements of orderly, effective administration of justice require it, however, the Court must sustain the practice. But the Supreme Court has said:

> "Orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in the state in which the cause of action did not arise, in which the transportation giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad and in which the plaintiff does not reside."

From the standpoint of the avoidance of waste in interstate transportation which the Supreme Court emphasizes, it is apparent that the effect of a proceeding of this kind, where jurisdiction is obtained by garnishment, is the same as it would be if obtained by service on an agent, the same witnesses will have to attend, the same expense will be entailed and the same burdens will be imposed upon the carriers and upon the public.

The U. S. Supreme Court evidently is in doubt as to whether justice does not require that a foreign carrier submit to the jurisdiction of our courts where the plaintiff is a resident of the state, or where the transaction giving rise to the cause of action was entered upon within the State, in spite of the burden imposed on interstate commerce thereby. In the absence of a ruling of the Court on that point it is probable we shall have to follow our own decisions in such cases, whether *in personam* or *in rem* and assume jurisdiction.

To reach the conclusion that the plaintiff in this case cannot obtain jurisdiction in this way it is not necessary to over-rule the cases holding that garnishment of traffic balances is not interference with interstate commerce. In the Davis v. Farmers Equity case the Court does not so much complain of the manner of obtaining jurisdiction as it does of the fact that it is used to bring before our courts cases which belong in other jurisdictions, the trial of which here is unjust and unreasonable both as to the carriers themselves and the public, which maintains them.

So here it is not the garnishing of traffic balances which creates the burden, but the using of garnishment to obtain jurisdiction in cases which cause an unreasonable obstruction to and an undue burden on interstate commerce.

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1923.

No. 232.

ATCHISON, TOPEKA & SANTA FE RY. CO. - - - *Appellant*

vs.

EDMUND R. WELLS, ET AL - - - - - - - - *Appellees.*

BRIEF FOR APPELLEES.

GEO. E. WALLACE, *and*
LEA, McGRADY, THOMASON & EDWARDS,
Attorneys for Appellees.

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BRIEF FOR APPELLEES.

Appellant's statement that all allegations of its bill were sustained by the agreed facts on which the case was tried, is not accepted as correct. The allegation of unlawful conspiracy to unduly burden appellant by wrongfully bringing damage suits against it in the courts of Texas, is not sustained. The agreed fact on that issue is in Par. 11 Print. Rec. 42. The answer of the garnishee admitted it was indebted to appellant $150,000.00, traffic balances for interstate freight, and it was because of this indebtedness that the state court entered judgment and awarded execution against the garnishee. Such judgment impounded no specific property or funds belonging to appellant. See Par. IV answer of garnishee. Print. Rec. 27; Judgment against garnishee Print. Rec. 31-32. It was agreed that such funds would have been used by appellant in

the conduct of its interstate and in its intrastate business in other states. Par. 8th Print. Rec. 39. No personal judgment was rendered in the State Court against appellant. Print. Rec. 30-31. There was no showing that such funds were necessary in the conduct of its interstate business.

I.

Appellant's first proposition is that the Texas statutes did not authorize a garnishment upon an unliquidated demand, and therefore the judgment against the garnishee is void. If such judgment be void, it is no lawful excuse for the garnishee's refusal to pay appellant what is owing; appellant has adequate remedy at law for its debt, and is not entitled to file this bill in equity. But even if the State court was in error in construing the Texas Statutes as authorizing the garnishment, this was error of law that should have been corrected by appeal, and can't be urged in this collateral proceeding as a reason to declare the judgment void. Bank of Cumberland v. Simpson (Ky) 77 SW 695; Am. Exp. Co. v. Mullins 212 U.S. 311; Wagley v. Wagley (Tex) 230 SW 493.

But the Texas statutes authorized the garnishment. Art 271 of Texas Rev. Stat. of 1911, so far as material reads:

"The clerks of the district courts x x x, may issue writs of garnishment returnable to their respective courts in the following cases:

1. Where an original attachment has been issued as provided in the foregoing chapter.

2. Where the plaintiff sues for a debt and makes affidavit, etc.

3. Where the plaintiff has a judgment and makes affidavit," etc.

It will be noticed that ground one authorized a garnishment in any case where an original attachment has been legally issued "as provided in the foregoing chapter," which is Chap one of title 11 of said revision. While it is true that

prior to 1913 such attachment could not issue in an action for damages for tort, this was remedied by Act of 1913 Leg. copied on pp. 13-14 of appellant's brief, which act by its terms is expressly made a part of said Chap. one, as article 247a thereof. The original attachment having rightfully issued, the garnishment was authorized, according to the literal terms of the statute. It is a rule of statutory construction that the grounds for attachment having been enlarged by subsequent legislation, the right to garnishment under existing statutes, dependent solely upon the issuance of an attachment, automatically becomes enlarged. Kuger's Appeal 55 Pa. St. 123; Cole v. Circuit Judge (Mich) 64 NW 741; Gaston v. Lamkin (Mo) 21 SW 1100. Paragraph one of the garnishment statute above quoted, Art. 271, has never required that the attachment must have issued upon a liquidated demand or for debt. There was no occasion for the legislature to amend the statutes further, in order to authorize a garnishment in any case where an original attachment had issued. It was not necessary that the attachment be levied or returned, to authorize the garnishment. Wilson v. Anderson (Tex) 54 SW 928; 23 Cyc. 360, note 8; Pease v. Richie 24 NE 433.

II.

Appellant's second contention, brief 21, is that no valid judgment can be rendered against the garnishee till there is a valid personal judgment rendered against the defendant, which could not be done in this case because defendant was a non-resident and did not appear. This is fully answered in Harris v. Balk 198 U. S. 215 and the following Texas cases: Wilson v. Anderson 54 SW 928wr; Grizzard v. Brown 22 SW 252; Studebaker v. Gerlach 192 SW 545; Goodman v. Henley 80 Tex. 499, 16 SW 432; Berry v. Davis 77 Tex. 191, 13 SW 978; Ry v. Swartz 115 SW 275wr. Art 293 Tex. Rev. Stat. expressly authorizes a personal judgment against the

garnishee where it is indebted to the defendant.

III.

Appellant's third contention, brief 28, amounts to this; that the judgment against the garnishee should be enjoined because a debt owing to it by the garnishee growing out of interstate traffic balances cannot be garnished at the residence of the garnishee where the plaintiff and defendant are non-residents of that state and the cause of action did not arise there. We answer as follows:

1. If the debt garnished was not subject to garnishment, the garnishee owed appellant the duty, either (a) to give timely notice to appellant and request it to defend the garnishment, or (b) set up the exemption in its answer and prosecute this defense by appeal to the court of last resort. Not having done either, the judgment against the garnishee and payment of it, cannot be urged by the garnishee as a defense, when sued by the appellant for the same debt. Ry. v. Whipsker 77 Tex. 14, 13 SW 639; Barber v. Bank (Tex. Civ) 218 SW 156 wr 226 SW xv; Trammel v. Ullman 96 SW 648; American Exp. Co. v. Mullins 212 U. S. 311; Chicago, R. I. & P. Ry. v. Sturm 174 U. S. 710; Harris v. Balk 198 U. S. 215; Day v. Barnham 82 Mo. Ap. 543; St. L. & S. F. Ry. v. Crews (Okla) 151 P. 879; So. Ry. v. Fulford 125 Ga. 103, 5 Ann. Cas. 168 & note;

There being nothing to show that appellant knew of the garnishment, or that the garnishee notified appellant thereof or requested it to defend against the same, and altho the garnishee did set up the exemption of the fund, it submitted to an erroneous judgment in the trial court, when it could have been relieved from such judgment by appealing upon the face of the record; if not sooner, at all events when the case reached this court, has now lost the right by its own negligence and folly, to set up the garnishment judgment as a defense to a suit against

it by appellant, for the same debt. Such garnishment judgment would not be a defense to the suit of appellant in the Texas court, under the holding in Ry. v. Whipsker 77 Tex. 14. The full faith and credit clause in the Constitution and in R. S. Sec. 905 is not violated; leaving appellant free to compel payment from the garnishee, the same as if no garnishment had issued. It is the theory of our judicial system, both national and state, that errors of law in the judgments of trial courts should be corrected by appeal and not by collateral injunctions.

2. The garnishee was a necessary party to this suit, without which the court could in no event grant appellant an injunction. Harwood v. Ry. 17 Wallace 78; Wickliffe v. Eve 17 Howard 470.

3. The debt owing by the garnishee for traffic balances on interstate freight is subject to garnishment. Davis v. Ry. 217 U. S. 157; International Harvester Co. v. Kentucky 234 U. S. 579.

It is not within the power of the federal courts to prescribe what shall be the policy of the state courts. If there be a difference in such policy, that would not justify federal courts in enjoining the judgment of state courts. Congress has not prohibited suits against railroads doing interstate business, nor undertaken to regulate such suits, except in instances not applicable here. Davis v. Ry. 217 U. S. 157, decided April 1910, expressly held that traffic balances arising from interstate hauls were subject to garnishment in a suit like this. Several times since then Congress has considered and past legislation affecting interstate carriers, presumably with full knowledge of that holding, and it should be assumed that Congress approved such policy, until it has expressly legislated to the contrary. The policy outlined by the President during Government control, referred to in the recent case of Davis v Farmer's Cooperative Equity Co., decided by this court May 24, 1920, prohibiting the bringing of suits in foreign or re-

mote jurisdiction, and the war-time act of Congress taking Government control of railroads and prohibiting all judicial seizures of railroad properties, died with the ceasing of Government control. The act of Congress, the Transportation act, turning the railroads back to their owners, is strong presumptive evidence that Congress did not mean to continue such policies. It is not to be supposed that Congress would have left such an important matter as exempting such funds from attachment to mere inference.

Altho alluded to in the last cited case, we don't see force in the argument that the defandant may complain because the suit is not brought at the residence of the plaintiff. In fact the Federal Constitution gives every citizen of the United States the same rights in the courts of Texas that a citizen of Texas has. Sec. 2 Art. IV; Sec. 1, 14th Amendment. By the local law, non-residents have always been accorded the full rights in the Texas courts which residents have. Ward v. Lathrop 11 Tex. 287; Grizzard v. Brown (Tex) 22 SW 252. This holding is within the policy of the holding in Harris v. Balk 198 U. S. 215;

The cause of action was transitory and could be sued on anywhere the defendant could be found, or its property seized. Tenn. Coal, I. & R. Co. v. George 232 U. S. 354; A. T. & S. F. Ry. v. Sowers 213 U. S. 55; Dennick v. Ry. 103 U. S. 11; St. L. S. W. Ry. v. Smitha (Tex. Sup) 232 SW 404; Rivera v. Ry. (Tex) 149 SW 223; G. C. & S. F. Ry v. Beezley (Tex) 153 SW 651.

There is not evidence that the funds garnished were necessary to enable appellant to carry on its interstate business, or in fact any other business conducted by it. For all that the court knows, the defendant was in a position to have declared these funds out in dividends to its stockholders, or have donated them to charitable uses. A dollar earned in interstate traffic has no more value to appellant than has a dollar

secured in any other way. A dollar so earned is not accompanied with any public trust. For aught that appears, the debt of the garnishee to appellant may have been funds allowed to accumulate for several months and voluntarily left on deposit with the garnishee. The rule is of too long standing and well settled in well nigh if not in all of the States, that a non-resident may be sued to the extent that his effects may be seized by court process, to now be overturned except by legislation. The courts have never felt justified in restraining the seizure of railroad property by court process, except in receiverships or other insolvency proceedings and then only temporarily.

The debt garnished had ceased to have any of the elements of interstate commerce. The haul had been compled, delivered to the consignee and paid for. It thereafter was a simple, ordinary debt owing by the garnishee to appellant. If the court has the right to hold that appellant's effects in Texas should not be seized by court process then it may hold that its effects cannot be seized by such process in any other state, not even in the state of its residence. If we once embark to any extent upon such a policy, like riding an unruly horse, we can't know where it will end.

4. The appellant had the right to appear, become a party to the garnishment suit and claim the exemption of the debt from garnishment. Ry. Whipsker 77 Tex. 14. It may be assumed appellant had notice of the garnishment in time to have appeared and made the contest, since neither its bill or proof negatives such notice. If it had such notice it should have taken such action. Not having done so, the present bill is wanting in diligence, good faith and the necessity of resorting to equity.

5. The State court had jurisdiction over the person of the garnishee and having rendered a personal judgment against it, such judgment is valid in this collateral attack; if there was

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1923.

No. 232.

ATCHISON, TOPEKA & SANTA FE RY. CO. *Appellant*

vs.

EDMUND R. WELLS, ET AL - - - - - *Appellees.*

PETITION FOR REHEARING BY APPELLEES.

GEO. E. WALLACE,
CLAUDE B. HUDSPETH,
Attorneys for Appellees.

[illegible] BROS. PRINTING CO

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PETITION FOR REHEARING BY APPELLEES.

Appellees petition for a rehearing, and their counsel, Geo. E. Wallace, certifies that it is presented in good faith, believing it is meritorious, well founded in point of law, is not made for delay and should be granted and that the judgment of reversal heretofore rendered should be set aside for the following reasons:

We contend that appellant had no such interest in the judgment obtained by Wells against the garnishee as entitled appellant to enjoin same. Such judgment did not seize or condemn any property of appellant. It was

only a personal judgment against the garnishee with no lien upon any property or fund, and to be satisfied by execution against any property of the garnishee. While such judgment was based upon the finding of the court that the garnishee was indebted to appellant, yet such finding was not the judgment. The judgment against the garnishee was personal and unconditional. While such judgment was erroneous, in matter of law, as held by this court, the same could and should have been corrected had the garnishee appealed therefrom. No appeal was taken, nor did the garnishee give notice to the appellant of the garnishment proceeding, or ask it to come in and defend. Such failures upon its part should not be excused by the mere fact that the garnishee set up in its answer the exemption from garnishment of the debt it owed appellant, without prosecuting that defense through the channels provided by law. Therefore the payment of the judgment of Wells against the garnishee would not be a defense when appellant should sue the garnishee for such debt. American Express Co. v. Mullins 212 US 311; Harris v. Balk 198 US 215; Ry. v. Whipsker 77 Tex. 14, 13 SW 639; Goodman v. Henly 80 Tex. 498, 16 SW 432; Barber v. Bank (Tex. Civ.) 218 SW 156, writ of error denied by supreme court, 226 SW xv; Trammel v. Ullman 96 SW 648; Day v. Burnham 82 Mo. Ap. 543; St. L. & S. F. Ry. v. Crews (Okla) 151 Pac. 879; So. Ry. v. Fulford 125 Ga. 103, 5 Ann. Cas. 168 and note.

Certainly, if the garnishment judgment was no defense to the suit of appellant against the garnishee for the debt owing, appellant was not injured thereby and could not enjoin same.

Wells was under no contract with any one not to

sue appellant or the garnishee; and herein, the instant case differentiates, in facts and principle, from Wells Fargo v. Taylor 254 US 175 relied upon by the Court. Taylor was under contract with Wells-Fargo not to sue or make claim against the Railroad company for damages. Wells-Fargo was under contract with the Railroad to indemnify it against any such claim of Taylor. Therefore this Court properly held that the prosecution of such claim by Taylor against the Railroad in violation of his contract with Wells-Fargo was inequitable and contrary to good conscience, and might be enjoined by Wells-Fargo who was directly prejudiced thereby. Would the court have sustained such injunction had not Taylor been under such contract with Wells-Fargo? We think not.

The garnishee could not have enjoined Wells from prosecuting his suit because it had a clear and adequate remedy at law by appeal. Cavanaugh v. Looney 248 US 453.

The Texas courts hold that a judgment of a Texas court rendered against the garnishee on a claim that is for any reason not subject to garnishment, where the garnishee neither notified its creditor of the pendency of such proceeding, nor availed itself of the remedy provided by law for preventing such judgment being rendered or having it set aside on appeal, is no defense when the garnishee is sued by its credtor for the same debt. See Texas cases above cited.

The full faith and credit clauses of the constitution and statute only require other courts to give such effect to a Texas court judgment as the courts of Texas give to it.

The Texas court had jurisdiction over the person of the garnishee and over the subject matter, and rendered

a final judgment. Certainly that judgment was not void, however erroneous in law. See well considered case of Bank v. Simpson (Ky) 77 SW 695. In that case the judgment was held valid, altho the cause of action was based upon a statute which was unconstitutional. See also Marin v. Augedahl 247 US 142; Mutual &c Asso. v. Phelps 190 US 147 at p. 159. Menard v. McDonald (Tex) 115 SW 63. The judgment in favor of Wells against appellant shows upon its face that it is not a personal judgment—a mere form—and expressly limited in its effect to such satisfaction as may be obtained against the garnishee.

As we are in a court of equity, we contend that the failure of the garnishee either to notify the appellant to come in and defend the garnishment, or to appeal from a judgment erroneous in law upon the face of the record and have it set aside in the usual and orderly manner, as contemplated by law it should do, ought in good conscience to estop the garnishee from setting up such judgment as a defense when it is sued for such debt by appellant.

We cannot see that it was contrary to good conscience for Wells to collect the judgment he had obtained against the garnishee, where there was no fraud, accident or mistake, where he was not under contract to forego such claim. We pray that the decree of reversal be set aside and the case be affirmed.

Respectfully submitted,

GEO. E. WALLACE,

CLAUDE B. HUDSPETH,

Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 232.—October Term, 1923.

The Atchison, Topeka & Santa Fe Railway Company, Petitioner, *vs.* Edmund R. Wells et al. } On Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[May 12, 1924.]

Mr. Justice Brandeis delivered the opinion of the Court.

Wells, a citizen and resident of Colorado employed by the Atchison, Topeka and Santa Fe Railway Company, was injured while performing his duties in New Mexico. He sued the company in a state court of Texas, but could not make personal service upon it within that State.[1] Wells procured from the same court a writ of garnishment to a Texas railroad company whose line connected with the Santa Fe; which had in its possession Santa Fe rolling stock; and which owed to it large sums on traffic balances. Thereafter, constructive service was made upon the Santa Fe, by serving one of its officers in Kansas and by publication in a Texas newspaper. The Santa Fe did not appear in the action; and judgment in the sum of $4,000 and costs was entered against it by default. Objection by the garnishee to the jurisdiction having been overruled, a judgment was entered that Wells recover from it this sum with interest and costs, in satisfaction of his judgment against the Santa Fe. To enjoin the enforcement of these judgments, suit was brought by the Santa Fe in the federal court for western Texas against Wells, who had meanwhile become a resident of that State, and his counsel. The case was heard on agreed facts; and a decree dismissing the bill was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. 285 Fed. 369. It is here on writ of certiorari under Section 240 of the Judicial Code. 261 U. S. 612.

The rolling stock held by the garnishee was then being used in interstate commerce and the amount due on traffic balances

[1] See Atchison, T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513.

arose out of transactions in such commerce. These facts did not render the property immune from seizure by attachment or garnishment. *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 217 U. S. 157. But the writ of garnishment is void because of the purpose for which it was invoked. The Santa Fe is a Kansas corporation. It had not been admitted to Texas as a foreign corporation. It had not consented to be sued there. It did not own or operate any line of railroad within the State; and had no agent there. The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another State to prosecute in Texas a cause of action which arose elsewhere against a railroad corporation of another State, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there. For the reasons stated in *Davis* v. *Farmers' Cooperative Co.*, 262 U. S. 312 (decided since the entry of the judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute as construed and applied is invalid.

Relief against the void judgments entered was properly sought by the Santa Fe in the federal court. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175. See *Essanay Film Co.* v. *Kane*, 258 U. S. 358, 360. The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the court in the Wells suit interfered unreasonably with interstate commerce. The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare *The Firestone Tire & Rubber Co.* v. *Marlboro Cotton Mills*, 282 Fed. 811, 814. Nor could its right not to be sued there be affected by anything which the garnishee did or omitted to do. Moreover, the garnishee's objection to the jurisdiction (on grounds later upheld by this Court in the *Farmers' Cooperative Co.* case) had been overruled by the state court. We have no occasion, therefore, to consider further the scope or the provisions of the statutes concerning garnishment.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.